# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 40

FRANK M. RIDER, JOHN F. BURGESS, AND SAMUEL M. RUTLEDGE, COMMISSIONERS OF MUSKINGUM COUNTY, OHIO, PLAINTIFFS IN ERROR,

*vs.*

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED DECEMBER 10, 1897.

(16,745.)

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INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | 1 | 1 |
| Transcript from United States commissioner | 1 | 1 |
| Order granting leave to file criminal information | 7 | 5 |
| Criminal information | 7 | 5 |
| Minute entry of trial | 9 | 7 |
| Motion for new trial | 9 | 7 |
| Bill of exceptions | 10 | 7 |
| Evidence for complainant | 10 | 8 |
| Testimony of Wm. E. Merrill | 10 | 8 |
| C. E. Gillette | 18 | 14 |
| Edmund Moser | 24 | 19 |
| Agreement as to evidence | 26 | 20 |
| Evidence for defendants | 27 | 20 |
| Testimony of Harvey Darlington | 27 | 20 |
| Oliver Demster | 32 | 24 |
| John Mason | 38 | 28 |
| J. F. Burgess | 41 | 30 |


Judd & Detweiler, Printers, Washington, D. C., June 14, 1898.

| | Original. | Print. |
|---|---|---|
| Evidence for complainant in rebuttal | 44 | 32 |
| Testimony of C. E. Gillette | 44 | 32 |
| Charge to jury | 46 | 34 |
| Motion for new trial overruled | 47 | 34 |
| Judge's certificate to bill of exceptions | 47 | 34 |
| Exhibit A—Letter, Colonel Merrill to commissioners, December 19, 1890 | 48 | 35 |
| Letter, Colonel Merrill to commissioners, January 8, 1891 | 50 | 36 |
| Letter, commissioners to Colonel Merrill, December 23, 1890 | 51 | 36 |
| Letter, commissioners to Secretary of War, February 3, 1891 | 52 | 36 |
| Act of March 30, 1872 | 54 | 37 |
| Orders of September 2, 1874, and May 6, 1884 | 55 | 37 |
| Extract from deed from Ohio to United States | 55 | 38 |
| Letter, Colonel Merrill to Lieutenant Gillette, October 16, 1889 | 58 | 39 |
| Letter, Colonel Merrill to Lieutenant Gillette, October 28, 1889 | 59 | 39 |
| Letter, Lieutenant Gillette to Colonel Merrill, November 22, 1889 | 60 | 40 |
| Letter, Lieutenant Gillette to Colonel Merrill, January 6, 1890 | 61 | 40 |
| Letter, Colonel Merrill to commissioners, January 22, 1890 | 62 | 40 |
| Letter, Lieutenant Gillette to commissioners, January 24, 1890 | 63 | 41 |
| Letter, commissioners to Lieutenant Gillette, January 24, 1890 | 64 | 41 |
| Letter, Lieutenant Gillette to Colonel Merrill, February 1, 1890 | 65 | 41 |
| Letter, Colonel Merrill to Lieutenant Gillette, February 3, 1890 | 66 | 42 |
| Letter, commissioners to Colonel Merrill, February 4, 1890 | 67 | 42 |
| Letter, Lieutenant Gillette to Colonel Merrill, February 7, 1890 | 68 | 42 |
| Letter, Colonel Merrill to Lieutenant Gillette, February 8, 1890 | 69 | 43 |
| Letter, Lieutenant Gillette to Colonel Merrill, February 14, 1890 | 70 | 43 |
| Letter, Lieutenant Gillette to Colonel Merrill, February 15, 1890 | 71 | 43 |
| Letter, commissioners to Lieutenant Gillette, August 9, 1890 | 72 | 43 |
| Letter, Lieutenant Gillette to Colonel Merrill, August 11, 1890 | 73 | 44 |
| Letter, commissioners to Secretary of War, August 20, 1890 | 74 | 44 |
| Letter, Lieutenant Gillette to Colonel Merrill, August 23, 1890 | 75 | 44 |

| | Original. | Print. |
|---|---|---|
| Exhibit A—Letter, Colonel Merrill to Lieutenant Gillette, December 8, 1890 | 76 | 45 |
| Letter, Lieutenant Gillette to Colonel Merrill, December 9, 1890 | 77 | 45 |
| Letter, Colonel Merrill to commissioners, December 19, 1890 | 78 | 45 |
| Letter, commissioners to Colonel Merrill, December 23, 1890 | 80 | 46 |
| Letter, Lieutenant Gillette to Colonel Merrill, December 24, 1890 | 81 | 46 |
| Letter, Lieutenant Gillette to Colonel Merrill, February 3, 1891 | 82 | 46 |
| Letter, Colonel Merrill to Lieutenant Gillette, February 4, 1891 | 84 | 47 |
| Letter, Lieutenant Gillette to Colonel Merrill, February 10, 1891 | 85 | 47 |
| Letter, Secretary of War to commissioners, February 25, 1891 | 86 | 48 |
| Letter, Colonel Merrill to Lieutenant Gillette, March 21, 1891 | 87 | 48 |
| Letter, Colonel Merrill to Lieutenant Gillette, October 9, 1891 | 88 | 49 |
| Letter, Lieutenant Gillette to Colonel Merrill, October 31, 1891 | 89 | 49 |
| Letter, Colonel Merrill to Lieutenant Gillette, November 2, 1891 | 90 | 49 |
| Certificate of Chief of Engineers | 91 | 49 |
| Certificate of Secretary of War | 91 | 49 |
| Notice, Secretary of War to commissioners, February 25, 1891 | 92 | 50 |
| Exhibit B—Map | 93a | 50 |
| Opinion | 93 | 51 |
| Mandate of Supreme Court of the United States | 100 | 55 |
| Judgment | 101 | 56 |
| Order allowing bill of exceptions | 102 | 57 |
| Petition for writ of error | 103 | 57 |
| Assignment of errors | 103 | 58 |
| Order allowing writ of error | 104 | 58 |
| Bond on writ of error | 105 | 59 |
| Clerk's certificate | 107 | 60 |
| Writ of error | 108 | 61 |
| Citation | 110 | 61 |
| Marshal's return | 111 | 62 |

1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and eastern division of the southern district of Ohio, begun and held at the court-rooms, in the city of Columbus, on the first Tuesday of June, being the first day of that month, in the year of our Lord one thousand eight hundred and ninety-seven, and in the one hundred and twenty-first year of the Independence of the United States of America—present, the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

THE UNITED STATES OF AMERICA
*vs.*
FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. RUTLEDGE.

Be it remembered that heretofore, to wit, on the 21st day of November, A. D. 1891, there was filed in the clerk's office of the court aforesaid a certain transcript from United States Commissioner N. S. Chandler, a commissioner for the southern district of Ohio; which said transcript is clothed in the words and figures following, to wit:

*Transcript of Proceedings.*

Transcript from criminal docket of United States circuit court commissioner.

UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

No. 1.

UNITED STATES OF AMERICA
*vs.*
FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. RUTLEDGE, Defendants.

Before me, Norwood S. Chandler, a commissioner of the circuit court of the United States within and for said district, complaint and affidavit was made on this 27th day of October, 1891, by Col. William E. Merril-, charging that, in substance, on or about the 15th day of October, 1891, at Zanesville, in said district, the defendants, Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, being then and there the duly constituted and acting board of county commissioners of the county of Muskingum and the State
2 of Ohio, and who are charged by law with the control, alteration, and repair of bridges in the said county, to wit, the bridge between Taylorsville and Duncan Falls, Ohio, and having heretofore, to wit, on February 25th, 1891, been notified, in writing, by the Secretary of War that the said bridge over the Muskingum river, one of the navigable waterways of the United States, was then and there an unreasonable obstruction to the free navigation of such

waters on account of not being provided with a draw-span below the now United States lock No. 9, in said river, and requiring the following alterations to be made, to wit, the construction of a draw-span in said bridge below the said lock in accordance with the plan shown in a map to said notice attached, and prescribing a reasonable time, to wit, on or before the 30th day of September, 1891, in which to make said alteration, so as to render navigation under said bridge reasonably free and easy, did unlawfully, knowingly, and wilfully neglect and refuse to comply with the lawful order of the Secretary of War to remove said obstruction to the navigation and to make the alterations specified in said notice and above set forth, contrary to the form of sections 4 and 5 of an act of Congress approved September 18th, 1890, in such case made and provided. On October 27th, 1891, issued warrant to John Drake, deputy U. S. marshal, returnable on October 29th, 1891. Warrant returned indorsed in substance as follows:

"Received this writ on the 27th day of October, 1891, and on the 28th day of October, 1891, I arrested the within-named Frank M. Rider and John F. Burgess and took them before the court, and on the 29th day of October, 1891, I arrested the within-named Samuel M. Rutledge and have his body now in court. John H. Drake, deputy U. S. marshal."

On October 27th, 1891, I admitted Frank M. Rider and John F. Burgess to bail in the sum of $1,000.00 each for his appearance before me on October 31, 1891, at 9 o'clock a. m., upon the recognizance of S. M. Winn and Frank H. Southard. On October
3 29th, 1891, I admitted Samuel M. Rutledge to bail for his appearance before me at the same time on the recognizance of the same parties. On October 31, 1891, defendants came before me, the said commissioner, at my office, in the city of Zanesville, in said district, and waived the reading and explanation of the complaint and entered a plea of not guilty to the charge made in the complaint; and thereupon, in preliminary trial to determine whether there exists probable ground to believe said defendants were guilty as charged, the following witnesses were sworn and examined on the part of the plaintiff: Col. William R. Merrill, Lieut. Guillette, and C. E. Mosier; and thereupon the United States rested; and thereupon the defendants, by their attorney, S. M. Winn, demurred to the evidence; which demurrer was overruled; to which overruling of said demurrer the defendants then and there excepted, and, the defendants desiring to offer no evidence in their own behalf, the case was submitted, and, after hearing the arguments of counsel for plaintiff and defendants and upon the evidence of the said witnesses, it appearing to me, the commissioner, that the laws of the United States have been violated as charged in the complaint, and that there is probable cause to believe the defendants guilty of the alleged offence, it was ordered that they give bond in the sum of five hundred dollars each for his appearance before the United States district court for the southern district of Ohio, at Columbus, Ohio, to be there held on the first Monday in December, 1891, to answer said charge, and that in default of same they stand com-

mitted; and thereupon the defendants gave bond in the sum of five hundred dollars each for his appearance at said time and place, and, the United States district attorney consenting, John F. Burgess was taken as surety for F. M. Rider and Samuel M. Rutledge and F. M. Rider *and* surety for John F. Burgess.

UNITED STATES OF AMERICA, }
*Southern District of Ohio,* } *sct:*

I, Norwood S. Chandler, a commissioner of the circuit court for the southern district of Ohio, do hereby certify that the fore-
4 going writing is a true transcript of the proceedings had before me in the cause therein named, and that copies of the process and the examination and recognizances in said cause are herewith returned into the circuit court of the United States for the eastern division of the southern district of Ohio in pursuance of law.

In witness whereof I hereunto set my hand, at office, in said district, this 13th day of November, 1891.

NORWOOD S. CHANDLER,
*Commissioner of the Circuit Court, as Aforesaid.*

*Copy of Affidavit.*

UNITED STATES OF AMERICA, }
*Southern District of Ohio, City of Cincinnati,* } *ss:*

Before me, Henry Hooper, a commissioner of the circuit court of the United States for the southern district of Ohio, personally appeared this day Col. William E. Merrill, corps of engineers, U. S. A., who, being first duly sworn, deposes and says that on or about the 15th day of October, A. D. 1891, at Zanesville, in the district aforesaid, Frank M. Rider, John F. Burgess, Samuel M. Rutledge, being the and there the duly constituted and acting board of county commissioners of the county of Muskingum and State of Ohio, and who are charged by law with the control, alteration, and repair of bridges in the said county, to wit, the bridge between Taylorsville and Duncan Falls, Ohio, and having heretofore, to wit, on February 25, 1891, been notified in writing by the Secretary of War that the said bridge over the Muskingum river, one of the navigable waterways of the United States, was then and there an unreasonable obstruction to the free navigation of such waters on account of not being provided with a draw-span below the new United States lock No. 9, in said river, and requiring the following alterations to be made, to wit, the construction of a draw-span in said bridge below the said lock, in accordance with the plan shown in a map to said notice attached, and prescribing a reasonable time, to wit, on or before the 30th day of September, 1891, in which to make said alteration, so as to render navigation under said bridge reasonably free and easy, did unlawfully, knowingly, and wilfully neglect and refuse to comply with the lawful order of the
5 Secretary of War to remove said obstruction to the navigation and make the alteration specified in said notice and

above set forth, contrary to the form of sections 4 and 5 of an act of Congress approved September 19th, 1890, and in such case made and provided. Vol. 26, U. S. Stat., p. 453.

WM. E. MERRILL.

Sworn to before me and subscribed in my presence this 26th day of October, A. D. 1891.

HENRY HOOPER,

[SEAL.] *Commissioner of the Circuit Court of the United States for the Southern District of Ohio.*

*Copy of Warrant.*

Warrant.

The President of the United States of America to the marshal of the United States for the southern district of Ohio and to his deputies or any or either of them:

Whereas complaint on oath hath been made out in writing charging that Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, on or about the 15th day of October, in the year one thousand eight hundred and ninety-one, at Zanesville, in said district, being then and there the duly constituted and acting board of county commissioners of the county of Muskingum and the State of Ohio, and who are charged by law with the control, alteration, and repair of bridges in the said county, to wit, the bridge between Taylorsville and Duncan Falls, Ohio, and having heretofore, to wit, on February 25, 1891, been notified in writing by the Secretary of War that the said bridge over the Muskingum river, one of the navigable waterways of the United States, was then and there an unreasonable obstruction to the free navigation of said waters on account of not being provided with a draw-span below the new United States lock number nine, in said river, and requiring the following alterations to be made, to wit, the construction of a draw-span in said bridge below the said lock, in accordance with the plan shown in a map to said notice attached, and prescribing a reasonable time, to wit, on or before the 30th day of September, 1891, in which to make said alteration so as to render navigation free and easy, did unlawfully, knowingly, and wilfully neglect and refuse to comply with the lawful order of the Secretary of War to remove said obstruction
6 to the navigation and make the alterations specified in said notice and above set forth, contrary to the form of sections 4 and 5 of an act of Congress approved September 19th, 1890, in such case made and provided and against the peace and dignity of the United States of America:

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Frank M. Rider, John F. Burgess, and Samuel M. Rutledge and bring their bodies forthwith before me to answer the said complaint and be dealt with according to law for the said offense.

Given under my hand and seal this 27th day of October, in the year of our Lord one thousand eight hundred and ninety-one.

NORWOOD S. CHANDLER,
*Commissioner of the Circuit Court of the United States for the Southern District of Ohio.* [SEAL.]

Approved:
HENRY HOOPER,
*Assistant United States Attorney.*

7 And afterwards, to wit, on the 23rd day of November, A. D. 1891, an entry was made upon the journal of said court in said cause; which said entry is clothed in the words and figures following, to wit:

Entry, B. 318.

THE UNITED STATES
*vs.*
COMMISSIONERS OF MUSKINGUM COUNTY, O. } 211. Information.

On motion of the attorney for the United States, leave is given him to file a criminal information herein forthwith, and the same is according- done.

And afterwards, to wit, on the 23rd day of November, A. D. 1891, came the plaintiff, by its attorneys, and filed in the clerk's office of the court aforesaid a certain criminal information in this cause; which said criminal information is clothed in the words and figures following, to wit:

*Criminal Information.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

At the December term of the circuit court of the United States for the southern district of Ohio, eastern division, in the year of our Lord one thousand eight hundred and ninety-one, leave being first had and obtained, comes John W. Herron, attorney for the United States in said district, and informs the court that, as appears from a complaint on oath and a transcript of proceedings held before one Norman Chandler, a commissioner of this court at Zanesville, and now placed on file herewith, upon the fifteenth day of October, A. D. 1891, the defendants, Frank M. Rider, John F. Burgess, and Samuel F. Rutledge, were then and there the county commissioners in Muskingum county, in the State of Ohio, and then and there the persons empowered by the law of Ohio to construct, alter, and keep in repair all necessary bridges over streams and public canals on all State and county roads, and then and there the persons as such county commissioners controlling the bridge across the Muskingum river between Taylorsville and Duncan Falls, Muskingum county, Ohio, and the Secretary of War of the
8 United States, having good reason to believe that said bridge was then and there an unreasonable obstruction to the navi-

gation of said Muskingum river, one of the navigable streams over which the United States has jurisdiction, on the 19th day of December, 1890, gave notice in writing to the said defendants, commissioners, as aforesaid, setting forth in substance that the said bridge was considered an obstruction to navigation by reason of the fact that it had no draw for the passage of boats desiring to navigate the Muskingum river by way of the new lock just above the south end of the new bridge at Taylorsville, Ohio; and in order to afford said commissioners a reasonable opportunity to be heard and give evidence in regard to said complaint, Tuesday, the 6th day of January, 1891, was set and named as the day when such evidence would be heard before Lieut. Col. William E. Merrill, corps of engineers, at the U. S. engineer's office in Zanesville, Ohio, and which said day of hearing, at the request of defendants, was extended to the third day of February, 1891; and afterwards, to wit, on the 25th day of February, 1891, and after said day of hearing, the Secretary of War gave notice in writing to said defendants controlling said bridge, as aforesaid, that the said bridge was and is an unreasonable obstruction to the free navigation of the said river, one of the navigable waters of the United States, on account of not being provided with a draw-span below the new U. S. lock No. 9, in said river, and requiring the following change to be made, to wit, the construction of a draw-span in said bridge below the said lock, in accordance with the plan shown in a map attached to said notice and served upon said defendants, and prescribing that said alteration shall be made and completed within a reasonable time, to wit, on or before the 30th day of September, 1891, and that service of said notice, as aforesaid, was made on the 3rd day of March, 1891, by delivering personally a copy thereof to said commissioners at their office in Zanesville, Ohio.

And the said Frank M. Rider, John F. Burgess, and Samuel
9 M. Rutledge, county commissioners of Muskingum county, Ohio, as aforesaid, did unlawfully, on, to wit, the fifteenth day of October, 1891, at the place aforesaid and after receiving notice to that effect, as hereinbefore required, from the Secretary of War and within the time prescribed by him, wilfully fail*ed* and refuse*d* to comply with the said order of the Secretary of War and to make the alterations set forth in said notice, contrary to the form of sections 4 and 5 of an act of Congress approved September 18th, 1890, in such case made and provided and against the peace and dignity of the United States of America.

JOHN W. HERRON,
*U. S. Attorney, S. D. O.*

And afterwards, to wit, on the 11th day of December, A. D. 1891, an entry was made upon the journal of said court in said cause; which said entry is clothed in the words and figures following, to wit:

Entry, B. 329.

United States Circuit Court, Southern District of Ohio, Eastern Division, *ss:*

THE UNITED STATES OF AMERICA
*vs.*
THE COMMISSIONERS OF MUSKINGUM, CO., O. } No. 211.

This day came the parties, by their attorneys, and said defendants being present in court, thereupon a jury, being called, came, to wit, Lee Atherton, John C. Butler, Franklin Burlingame, J. D. Coles, George Johnston, William H. McBride, E. A. Peters, Adam Quick, John Rogers, George Seall, Albert Wright, and Joseph H. Geiger, who were duly empaneled and sworn well and truly to try the issues joined, and, having heard the testimony and the charge of the court, upon their oaths do find said defendants guilty in manner and form as charged in said information; whereupon counsel for defendants gave notice of motion for new trial.

And afterwards, to wit, on the 22nd day of December, A. D. 1891, came the defendants, by their counsel, and filed in the clerk's office of said court their certain motion for new trial in this cause; which said motion for new trial is clothed in the words and figures following, to wit:

*Motion for New Trial.*

10 United States District and Circuit Court, Southern District.

UNITED STATES, Plaintiff,
*vs.*
FRANK M. RIDER, JOHN F. BURGESS, & SAMUEL M. RUTLEDGE, Commissioners of Muskingum County, Defendants.

Motion for new trial.

Now comes the defendants and moves the court for a new trial in this cause for the following reasons, to wit: 1st, because the verdict is against the evidence and the law; 2nd, because the verdict is contrary to law; 3rd, because the verdict is not supported by the law; 4th, the court erred in charging the jury, and, 5th, for other errors apparent upon the record.

F. H. SOUTHARD &
S. M. WINN,
*Att'ys for Def'ts.*

And afterwards, to wit, on the 22nd day of January, A. D. 1892, there was filed in the clerk's office of said court certain testimony in this cause; which said testimony is clothed in the words and figures following, to wit:

*Testimony.*

Circuit Court of the United States, Eastern Division, Southern District of Ohio.

| | |
|---|---|
| UNITED STATES OF AMERICA, Complainant, *vs.* FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. Rutledge, County Commissioners of Muskingum County, Ohio. | No. 211. |

Be it remembered that on the trial of this cause at the December term, 1891, of the circuit court of the United States in and for the eastern division, southern district, of Ohio, at Columbus, Ohio, before the Honorable George R. Sage and a jury, the complainant, to maintain the issue on its part, offered in evidence the following testimony, to wit:

WILLIAM E. MERRILL, being first duly sworn, testified as follows:

Examined by Mr. HERRON:

Q. Give your full name, Colonel.

A. William E. Merrill.

Q. What is your profession?

A. United States engineer, in charge of the Muskingum and other rivers.

Q. How long have you had charge of these rivers?

A. I have had charge of the Muskingum since the Government took possession, in 1887. I have had charge of the others since 1870.

Q. Have you had charge of the improvements being made
11 at Taylorsville?

A. I have had general charge.

Q. Just state in as short manner as possible the general character of the improvements there.

A. The work that has been recently done by the United States has been to build a lock in the west end of the dam at Taylorsville, and to raise the dam at Eagleport to bring the water up there so that navigation could be had through the main river.

Q. What was the means used here prior to the time when the Government took possession?

A. This dam was passed by means of a lateral canal with a lock at the lower end.

Q. Now, where was the bridge at that time?

A. At that time there were really two bridges, although you might consider them as connected.

Q. The fixed bridge over the river I am asking about.

A. There is the fixed bridge over the river and a swing-bridge over the canal.

Q. How far has the work on that improvement progressed?

A. You mean the work of the Government?

Q. Yes, sir.

A. The lock is finished, except the lower gates had not been put in the last time I knew of the work. There was no use to put them in until it could be utilized for navigation. It has been substantially finished for over a year.

Q. How has the dam been kept up?

A. It was built by the State, and we found it there and repaired it from time to time, keeping it in its original condition as to height.

Q. Where is the channel proposed to be built by the Government?

A. The Government proposes to let boats pass up and down the main river. Of course, when you get to the lock you go in towards the shore a short distance; below the lock boats will follow the middle of the river.

Q. I will ask you to state whether that improvement is beneficial to navigation at that point of the Muskingum river or not.

12 A. I have considered it of vital importance to successful commerce. It is impossible to keep the canal in condition for navigation, and the difficulty is increased since the building of the railroad and the removal of the gravel and sand has been going on. The digging of the sand from the side of the banks—some of it is brought to Columbus—brings large amounts of sand and gravel into the canal, until it is almost impossible to keep it navigable.

Q. Then you think this change must be made?

A. I do. I might add that I made a special report on that subject——

(Witness stopped by objection of counsel for defendants.)

Q. Now, where is the bridge with reference to this channel through which commerce will pass in the Muskingum river—the fixed bridge which is the obstruction to commerce of which we complain?

A. A very short distance below the lock, probably 150 feet, so that boats cannot go out of the lock without passing under it, and there being no draw, navigation by boats of any size is cut off.

Q. How high is the bridge above the water?

A. I don't recollect, but not what we would call a high bridge.

Q. Would it be possible for a steamboat to pass under that bridge?

A. A very small steamboat might, but the ordinary passenger packet of the Muskingum river could not pass at any stage without the lowering of the chimney. The Lizzie Castle could not probably get her pilot-house under at low water, and at ordinary stage of the water it would be quite impossible for a boat of any size to get under at all.

Q. I will ask you what correspondence you have had, if any, with the commissioners of Muskingum county in reference to this subject.

(And thereupon it was agreed that the entire correspondence between the parties above mentioned should be admitted in evidence, and the same are marked "Exhibit A" and made a part hereof.)

Q. Have you examined that blue print (handing witness print), which is plat of the improvements suggested?

13 A. Yes, sir; I examined it when it passed through my office.

Q. Was it made under your supervision?

A. The original drawing was, and I think that particular blue print, but blue prints are all fac-similes and there is no way of telling.

(And thereupon the blue print above shown witness was admitted in evidence, marked "Exhibit B," and made a part hereof.)

Q. I will ask you to state whether that plan furnished to the county commissioners of Muskingum county would render navigation of the Muskingum river possible at that point under the bridge.

A. It would.

Q. What length of time was given under that notice to the county commissioners of Muskingum county to make the change?

A. I think to the 30th of September.

Q. Was that a reasonable time for this change to be made?

A. It was, in my judgment.

Cross-examination.

By Mr. WINN:

Q. Where this new lock is that you have put in there, I will ask you to state whether or not navigation would be possible at that place in the Muskingum river, even with your locks and dams.

A. I don't know that I understand your question. Navigation would of course be possible, but that do-sn't seem to be quite what you want——

Q. Where is the channel of the river with reference to where you have placed this new lock and cut this channel?

A. Why, the deepest part of the natural river is about the middle of the river, as I recollect it, but you can't put a lock in the middle of the river. It must be on one side or the other.

Q. Now, then, if the change were made in this bridge as you request, then would the natural navigation of the river still be obstructed by the bridge?

A. I don't understand that question. Please repeat that.

Q. You understand what I mean when I say "natural navigation"?

14 A. I know what I understand—the river in a state of nature.

Q. Without locks or dams?

A. I understand that.

Q. If the change is made in the bridge that you have asked, still wouldn't it be an obstruction to navigation in the natural channel?

A. I- a state of nature; there is no natural navigation there and there hasn't been within my memory. For forty years the navigation has been entirely artificial.

Q. Suppose that these locks and dams were taken out of this river, then what navigation would there be at Duncan's Falls and Taylorsville?

A. Then navigation would not be very good and would be impossible in low water. Navigation would be limited to the medium and high stages. At least, that is my judgment. The conditions don't exist to give a positive answer, but from my knowledge of rivers would say that the river would not be navigable except by a very light craft, and navigation at any rate would be limited to the medium and high stages.

Q. Then, as I understand you, Colonel, you have no knowledge and give no estimate as to what the condition of the river would be in a state of nature?

A. I can only give my general estimate from being familiar with the western rivers, but the facts do not exist and have not existed for nearly fifty years.

Q. When did you first take control of the Muskingum river?

A. In 1887.

Q. At that time what means of navigation was provided at Taylorsville? A. There was a lateral canal, with a lock at the lower end to enable boats to pass Taylorsville dam.

Q. Now, Mr. Merrill, as you know the river, I will ask you to state whether in this river the natural channel would be navigable by steamboats in a state of nature, or as near as you can tell.

A. If by that question you mean would it be continuously navigable in all stages, I would say no; but if whether navigable in good and medium stages I would answer yes.

Q. With what kind of a boat would it be navigable?

15 A. That would be merely a matter of guessing, but probably two hundred tons.

Q. How as to propelling power?

A. Steam.

Q. Well, as to great or small?

A. I can't answer that. Boats can go up very still currents with ordinary propelling power with probably a little assistance from capstans, but they get up very slowly. The question of propelling power is rather a question of speed. Boats are frequently carried up through rapids which they cannot navigate by steam by being pulled through with steam capstans. That is the case to this day on the Tennessee river.

Q. Tell us what is the fall of the river at this place where this bridge is located per mile.

A. No, sir. That condition don't now exist, and our records are mainly limited to vertical falls created by our dams, and I don't know what is was before the dams were built.

Q. What is your judgment as to what the fall would be?

A. I never had occasion to study that. That would be a question of fact which I don't know. I have no opinion as to what the

fall is there at all. All I could do would — simply to make a guess.

Q. Let us have your guess.

A. I don't think it would be of any value. I prefer not to give it, as I have no data.

Q. I will ask you to state whether it would be as much as eight feet to the mile, in your judgment.

Q. I have no information whatever of the bed of the river above Taylorsville dam. It has been drowned out by the dam, and it is impossible for me to tell the fall below the lock. It would certainly not be that much in what is left of the open river.

Q. Well, if you can give us any judgment as to the fall there, I would be glad to have it.

A. The lift of the lock in low water is about eleven feet. If I had known that you wished that, that you expected to ask such a question, I could have given it to you exactly. We have all those data, but I don't carry them in my head.

Q. Can you give it approximately?

16 A. I did give it approximately as about eleven feet.

Q. I will ask you what you have done in this locality with reference to opening a channel for commerce.

A. I built a lock.

Q. Nothing more?

A. I have cleared out the approach below the lock to deepen the water.

Q. What lock—what approach?

A. I have deepened the channel for quite a distance below the lock.

Q. For what distance have you deepened the channel or canal?

A. There is no canal there.

Q. The channel?

A. I have deepened the channel in order to get the full benefit of the improvements——

Q. For what distance?

A. I don't recollect.

Q. What is your judgment?

A. It would be a mere guess. I should say twelve hundred feet, maybe.

Q. How have you deepened the channel?

A. By blasting.

Q. Blasting what?

A. The rock in there.

Q. Anything else than blasting the rock?

A. Well, incidental to the blasting of the rock, we removed the loose material to get at the rock.

Q. Below the rock did you do any dredging in the river?

A. No, sir.

Q. Below the rock I mean.

A. You mean downstream?

Q. Yes, sir.

A. We have not. It is probable that we will. We have a dredge-boat, which is used to keep open any channel that is filled up.

Q. Whereabouts in the river is the deepening of this channel made?

A. It has been made from the lower end of the lock at the middle of the river to a point some distance below in Salt creek, where I found a sufficient depth naturally.

Q. Before the raising of the Eagleport dam do you know whether navigation would be possible where you have stopped the deepening of the channel without that raising of the dam?

A. Certainly, but not in dead low water.

17 Q. Where is the deepening of this channel located with reference to the west shore of the river?

A. It follows the west shore for a short distance below the lock; then it gradually turns out to the middle of the river.

Q. I will ask you to state what is the course of the river at this point.

A. North and south, about—rather, it runs south.

Q. Now, taking the river from where the dam is located to where you strike the channel, I will ask you to state whether it is a straight channel or whether it is curved and which way.

A. The deepening below the lock follows the axis of the lock for a distance, probably three hundred feet, then curves gradually out to the middle of the river.

Q. I am asking you the course of the river itself, whether or not the river runs straight or is curved.

A. That depends on the piece of the river you take. About a mile, I should think, if you count the river above the dam; if you count above the dam, probably two miles of the river is straight.

Q. After the straight river, which way does it curve?

A. To the west.

Q. When you assumed control of the river, I will ask you to state how navigation was carried on at this point.

A. It was carried on through the canal.

Q. Was the bridge as now located any obstruction to that navigation?

A. It was quite an obstruction.

Q. To navigation through the canal?

A. Yes, sir.

Q. How?

A. It was badly built and very narrow.

Q. Which do you mean, the bridge or the canal?

A. The canal.

Q. I asked you about the bridge. I will ask you whether or not the bridge, as located when you assumed control of the river, was an obstruction to navigation where it was carried on at that time.

A. I understand that you now mean the fixed bridge over the main river—it was not. If you considered it all one bridge, the fixed bridge was not; if you considered them separate, the

18 fixed bridge was not.

Q. Where is navigation carried on now, by Taylorsville?

A. Navigation now is carried on through the canal; the boats cannot get under the bridge in controversy herein.

Redirect examination.

By Mr. HERRON:

Q. I will ask you whether this state of things which exists about the high and low water don't exist in the Ohio river. Take the falls at Louisville. I will ask you whether it is possible there to navigate it except as high water, except through artificial channels.

(Question objected to by counsel for defendants.)

Q. How long has the Ohio river been navigated by boats of different kinds?

A. That is a question of history. I should say from the settlement of the country.

Q. How far within your knowledge?

A. I have known that river to be actually navigated from 1870, when I first took charge of the Ohio river.

Q. It was then navigated?

A. Then actually navigated. I saw the boats at Marietta.

Q. And always by means of these side-out canals?

A. No, sir; half of the dams have no canals.

Q. But what navigation went from Zanesville down had to go by the side-out canal?

A. It had to pass Taylorsville, but there were no canals at quite a number.

Q. It had to pass through this canal?

A. Yes, sir.

And also C. E. GILLETTE, called on behalf of complainant, being first duly sworn, testified as follows:

Examined by Mr. HERRON:

Q. What is your position?

A. First lieutenant of the Engineers of the United States Army.

19 Q. What have you to do with the Muskingum River improvement?

A. In charge as assistant to Colonel Merrill.

Q. For how long?

A. Since 1888.

Q. Do you know of this improvement at Taylorsville?

A. Yes, sir.

Q. I will ask you if you know the bridge that crosses there.

A. Yes, sir.

Q. What improvements have been made there by the Government?

A. A lock practically completed. The channel approach from below has been opened out by removing the rock and the founda-

tions of an old mill, which was one of the main obstructions to the channel; a mill built out in the river, as I understand it.

Q. What is the improved course that the Government proposes to take as to navigation through Taylorsville at that point?

A. Navigation is to come up the main river and the canal is to be abandoned and the lock at the lower end is to be abandoned and removed to give the river at that point the natural width, which is very much contracted by the old lock.

Q. That is to be closed and navigation to go through the main channel of the river?

A. Yes, sir.

Q. How far have these improvements progressed?

A. The lock has been completed, except the lower gates and unimportant matters, and the removal of the rock is entirely completed.

Q. Well, now, the bridge as it is there now, what obstruction, if any, is it to navigation of the river, Lieutenant?

A. It is a perfect obstruction; complete bar to the navigation of the river.

Q. Has any movement been taken by the defendants towards removing the obstruction?

A. None that I have seen, and they have said that they would not remove it.

Q. Where is the proposed channel or navigation with reference to the body of the channel of the river?

A. The proposed channel follows the right bank for a short distance, then turns to the left and crosses the river. The excavation extends to the middle of the river.

20 Q. It goes south on the west side; then crosses to the other side?

A. Yes, sir.

Q. Which way does the body of the water run?

A. The body of the water runs near the middle of the river. The deepest cross-section of the river under the bridge would show the water a trifle deeper where our channel is made, although the body of water don't run there; but immediately under the br*dige* the water is a trifle deeper where we made the channel.

Q. Do you know what the fall of the river is at that point?

A. The fall of the river at low water I had measured last summer, when the dam below was broken, so I know the fall down below. The fall from the surface of the water immediately below the dam at the site of the old lock was two and eight-tenths feet.

Q. What distance?

A. A little more than a mile.

Q. That is the entire fall at that point from below the dam to where the old lock is?

A. Yes, sir.

Q. And was the natural surface of the water between these two points at that time?

A. Yes, sir; the fall was slightly increases, if anything, on account

of the cofferdam. I should say the fall I measured was less than the natural fall of the river.

Q. How much?

A. Three or four inches.

Q. Not more?

A. No, sir.

Q. I will ask you whether you have examined these plans for improvement.

A. Yes, sir.

Q. I will ask you whether those would make navigation possible there and convenient.

A. Yes, sir; it would.

Q. I will ask whether the length of time prescribed in the notice was a reasonable time for the making of the changes prescribed by the plan.

A. It was.

Cross-examination.

By Mr. SOUTHARD:

Q. As I understand you, the lock that the Government has constructed is in the west side of the dam?

21 A. The southwest end; yes, sir.

Q. This dam is across the main channel of the river at that point?

A. Yes, sir.

Q. Where is this bridge in question located, with reference to that dam?

A. At about 150 feet below and nearly parallel to it.

Q. For what distance does the channel that you have deepened below the locks follow the western shore of the river?

A. About 300 feet.

Q. Then it is deflected toward the center, I understand you?

A. Yes, sir.

Q. What is the width of the channel that the Government has deepened?

A. About forty feet at the lock and widens to about 125 feet at the lower end. It has been completed—the removal of the rock has.

Q. To what depth has the Government increased the water?

A. The depth in the channel at dead low water will be about six feet and a half—that is, the minimum.

Q. How much has the improvement deepened the natural?

A. Immediately under the bridge I think we took out about three feet and a half of rock, on the average.

Q. Below, how much?

A. It runs from that to nothing.

Q. The main channel of the river is on the opposite side of the river, is it not, Lieutenant?

A. Above the bridge the main channel is on the other side south. Our channel cuts across and joins that.

Q. What is the width of the river at that point immediately below the bridge?

A. Between seven and eight hundred feet; I don't remember exactly.

Q. Do I understand you that the fall from the dam a mile south is only a fraction over two feet?

A. Nearly three feet, the fall that we measured.

Q. As a part of the means for facilitating navigation at the point named, the Government has raised the dam, I believe, at some
22 point south?

A. At Eagleport.

Q. How much?

A. About four feet.

Q. Giving four feet additional water on the level above?

A. On part of the level. At the site of the bridge it gives not much over a foot.

Q. When the Government took possession of this river how was navigation accommodated at Taylorsville?

A. Navigation went through the side canal.

Q. It does still?

A. Yes, sir.

Q. This side canal extends from the dam above the bridge to a point south and empties into the river, I believe?

A. Yes, sir.

Q. What is the distance of the side canal?

A. About a hundred feet more than a mile.

Q. What do you know of the depth of water in the Muskingum river below this bridge in time of low water?

A. It is quite variable.

Q. Well, that does not answer my question, I submit.

A. Where do you mean?

Q. Below the bridge.

A. Under the bridge there was, I should think, from three to five feet; that would be in the deepest places. Down a few hundred yards below, two feet; it would be nearer two.

Q. At low-water mark?

A. Yes, sir; the dam, like all dams, washes out the material immediately below it and banks it up a distance below, so there is kind of a basin there.

Q. I am not asking for any particular point, but take that river below the dam, from the eastern to the western shore, what would be the average depth of water from shore to shore at low water?

A. How far below the dam?

Q. Take a distance of two miles.

A. Take a point below the dam for six hundred feet, the first hundred feet below the dam the depth would average five or six feet, the next hundred feet further would be five feet, the next hundred feet further, three and a half, and the sixth hundred
23 feet the average depth of water at low water would be about a foot, with gravel bottom.

Q. The river would be at low water narrowed to what breadth?

A. Not over 150 feet.

Q. And within that breadth what at the shallowest point would be the average depth?

A. I think at low water it would average a foot—about that.

Q. The shore from the west to the east is shelving, is it now?

A. I don't understand the question.

Q. The shore of the river is shelving—dips towards the east?

A. Yes, sir; it dips towards the deepest part of the channel.

Q. After the dam was constructed across the main channel of the river, I understand you, navigation has been continuously by the side-cut canal?

A. Yes, sir; when not interrupted by the canal being too full of mud for boats to get through.

Q. Do you know when the notice was served upon the county commissioners by the Government to remove the obstruction in question?

A. I don't remember the date; it was along in December or January.

Q. You personally don't know when it was served?

A. No, sir; approximately six months before September 30th last, as I remember it.

Q. Well, when you answer that that was a reasonable notice to the board of commissioners, what did you take into consideration, Mr. Gillette?

A. The removal of the obstruction. I think, however, that the commissioners could have removed the old span of the bridge, built a new pier, and put a new draw in operation readily in that time.

Q. Did you take into consideration whether the board was possessed of funds with which to make such improvement?

A. That is something I knew nothing about. From previous cases, however——

Q. I am not asking about previous cases.

Redirect examination.

24 By Mr. HERRON:

Q. You know the plans?

A. Yes, sir.

(Counsel for complainant reads act of Congress authorizing this change, found in volume 5, page 217, of Acts of Congress.)

Q. Do you know whether that lock was being built according to the report which was made about that lock?

A. Yes, sir.

Q. It was made by Colonel Merrill to the War Department?

A. Yes, sir.

Q. Did you see that report?

A. I saw the printed copy.

Q. The lock is being built according to that report?

A. Yes, sir.

Recross-examination.

By Mr. SOUTHARD:

Q. When you answered that the time to the 30th of September was a reasonable time for the board of commissioners to make this improvement, did you take into consideration the question as to whether any legislative act was necessary to enable the board to make this improvement?

A. I did not.

Q. Or whether the board had any funds which could be legally expended for such purpose?

A. I knew nothing about that.

And also EDMUND MOSER, called on behalf of complainant, being duly sworn, testified as follows:

Examined by Mr. HERRON:

Q. What is your occupation?

A. Civil engineer.

Q. What had you to do with drawing the plans for the change to be made at Taylorsville?

A. I was instructed—ordered to draw them by Colonel Merrill.

Q. Did you draw the plans?

A. Yes, sir.

Q. The plans contained in that blue print were drawn by you?

A. Yes, sir.

Q. Prepared by you under orders of Colonel Merrill?

A. Yes, sir.

25 Q. I will ask you whether those plans are proper plans for the change at Taylorsville to make navigation better at that point.

A. They are.

Cross-examination.

By Mr. SOUTHARD:

Q. Are you familiar with the situation of matters at Taylorsville?

A. Yes, sir.

Q. Have you a knowledge of the amount of commerce upon the river?

A. At present?

Q. Yes, sir; or for years past.

A. Only what I have seen from Colonel Merrill's report.

Q. You, personally, don't know from actual observation?

A. No, sir.

Q. Commerce upon the river is now conducted by means of the side-cut canal?

A. Yes, sir.

Q. The improvement that the Government has undertaken is to provide a new channel for commerce and the abandonment of the side-cut canal, I believe?

A. It is.

And thereupon it is agreed that any of the surveys in possession of Colonel Merrill may be referred to on motion for new trial, if desired, by counsel on either side.

And thereupon complainant rested.

26 And thereupon the defendants, to maintain the issue on their part, offered in evidence the following testimony, to wit:

And thereupon it is agreed between counsel that the bridge was constructed in accordance with the provisions of the act of the Ohio legislature, to be found in volume 67 of Ohio Laws, at page 127, and that the plans and specifications for the construction of the bridge were approved by the board of public works under date September 2, 1874; approval found in volume 8, page 222, in Records of the Board of Public Works of the State of Ohio, which may be referred to by counsel upon either side upon motion for new trial.

And thereupon it is further agreed between counsel that under the authority of an act of the General Assembly of Ohio, dated March 9, 1836, the authorities of the State, between 1836 and 1840, constructed a series of locks and dams on the Muskingum river between Marietta and Zanesville, including the dam at Taylorsville and a side-cut canal, and has mentioned the same until the passage of the act of legislature, March, 1887, found in volume 84 of Ohio Laws, page —, and the acceptance by Congress. See the act of August 5, 1886, volume 24, U. S. Statutes, at page 324. Either party may refer to the act of the Ohio legislature passed on the second day of May, 1885, Ohio Laws, volume 82, page —.

It is also agreed that all other acts of Congress or by the Ohio legislature in reference to this matter shall be considered in evidence and may be referred to by either party upon motion for a new trial.

It is further stipulated that the side-cut canal at Taylorsville is and has been spanned by a draw constructed under the authority of the State by the commissioners and in accordance with plans approved by the board of public works; all of this before the transfer of the jurisdiction of the river to the United States.

27 And also HARVEY DARLINGTON, called on behalf of defendants, being first duly sworn, testified as follows:

Examined by Mr. SOUTHARD:

Q. Your name is Harvey Darlington, I believe?
A. I believe so.
Q. What is your age, Captain?
A. Eighty-odd; eighty-two, nearly.
Q. How long have you known the Muskingum river?
A. 64 years last July.
Q. What connection, if any, at any time have you had with the river?
A. I held steamboat interest twenty some year; sometimes one, sometimes two.

Q. You have navigated the river?

A. Yes, sir.

Q. You knew the river before you navigated it?

A. Yes, sir; my father moved on the river in '28, when he came to Ohio, and it has been my home ever since.

Q. There is now across the river, between Taylorsville and Duncan's falls, a dam spanning the entire river, I believe?

A. Yes, sir; has been for years.

Q. Did you know the river before the building of the dam?

A. Yes, sir; waded it many a time at the falls.

Q. I wish you would describe the condition of that river before the building of the dam in question at the point we are speaking of?

A. How's that?

Q. I wish you would describe that river as it existed below the dam before the improvement of the river.

A. Well, sir, at high water—you understand it took very high water—all flour and such trades as we had was run out by flat boats to Orleans, but that only happened once or twice a year. Along in the spring of the year an occasional canal-boat came up, some salt boats boated up, and flats, but no navigation to depend on at all. This was in case of a rise in the river, sir.

28 Q. How was the river at that point generally? Describe the channel of the river in low water.

A. There was no navigation at all.

Q. Describe what the nature of the channel and the volume of the water was.

A. It was a very stiff current over rocks, a ledge of rocks, and considerable of a fall. I don't know how much fall, only as I heard it talked about. I never seen it measured.

Q. What was the width of the channel at low-water mark?

A. Quite narrow.

Q. What could you put it in feet? How much in feet?

A. Only guessing at it. The channel run between a pair of large rocks in the river. Here was one and there was the other. Whenever a boat was coming up and got into that place it was apt to pull through, and if it couldn't catch that it couldn't get through at all.

Q. What is the width of the rocks?

A. I disremember. Perhaps thirty or forty feet wide.

Q. And what depth of water below the dam in low water, the average depth at the foot of the falls?

A. Anywhere along above Salt creek——

Q. No; down below the dam?

A. Oh, well, in low water—it is pretty hard to tell. I rode it many a time. It wouldn't be more than knee deep to a horse in the channel. I lived there and rode over it, and it wouldn't be more than knee deep to a horse.

Q. Before the bridge was built, was there a public road across at that point?

A. A ferry?

Q. No; people crossing it, crossing the river on horseback and in wagons.

A. Yes, sir; it was a ferry landing for years.

Q. I am not asking about a ferry; I am asking about a ford across there.

A. It was forded there; people went over, ferrying.

Q. Did they go over on a ferry or without?

A. How?

Q. How did they cross the river?

A. Why, just rode a horse, drive a yoke of cattle across, or
29 go across in a buggy—general fording.

Q. When were the first steamboats upon this river?

A. Well, I can tell you the first one from hearsay, not from my knowledge.

Q. Well, go on.

A. The steamboat Putnam was the first boat that steamed the Muskingum river, I suppose, from hearsay. It run there after grain at very high stage of water. It was before my day in Ohio; I only know what they tell me. After that, there was a little boat, quite a small boat, built below the brewery by Captain Boyd. She mayble made a trip or two there over the falls. That was about all—very little.

Q. When did steamboating upon the river commence in your recollection?

A. When the board of public works finished the river. Boats were ready to take the trade as soon as it was done, and so continued until within six or seven years; the trade gave out.

Q. Now, Captain, how was the navigation accommodated by the side-cut canal?

A. Couldn't have made it at all without the canal.

Q. There wouldn't have been any navigation if it hadn't been for the canal?

A. Yes, sir.

Q. Well, after the canal was constructed and the locks and dam at Taylorsville, how was the navigation accommodated?

A. Why, we got through sometimes very easy; when the canal would be clean dredged out, it was very pretty getting through. If in the late fall and filled up from the banks we would have to pull through upon what we call "nigger" on the steamboat.

Q. There were no other means of carrying on commerce except by the side-cut canal?

A. No, sir.

Q. The commerce of the river sprung up after the completion of this improvement for slack-water navigation?

A. Entirely. There was no depending upon anything before; people didn't freight on it before, to make a business of it at all, but after that there was a fair business for a good while.

30 Cross-examination.

By Mr. HERRON:

Q. I understand this canal as used while the State had charge of the works was very difficult to get through?

A. Yes, sir; couldn't get through without it.
Q. It filled up so that navigation was obstructed very much?
A. At times, by the filling washing in.
Q. You said that without that canal navigation was impossible?
A. Would have had no navigation.
Q. If the improvements being made by the Government now to the channel are completed, will that make navigation possible?
A. I ain't been there since it is being improved.
Q. You don't know the change only by hearsay?
A. Yes, sir.
Q. You understand that the Government proposes to——
A. I understand they propose to throw away the canal and make navigation over the falls.
Q. If they succeed in that, navigation would be better?
A. Quicker.
Q. And more sure?
A. If they can get water there, I think it would be.

Redirect examination.

By Mr. SOUTHARD:

Q. Navigation, after the improvement of the river by slack-water navigation, was continuous until within a few years with the trade of the Muskingum?
A. Yes, sir.
Q. Navigation was continuous from the date of the improvement of the river by slack-water navigation until the State surrendered the river, was it not?
A. Of course, navigation was continued until the State went to improving the river. When it couldn't be run with larger boats it was run with smaller boats. If it couldn't be carried at that way, run in flatboats.
Q. The canal at times had to be dredged?
A. All had to be dredged on the river about once or twice
31 a year to keep them good and open so could get through easy.
Q. Now, the bridge is question is between the town of Taylorsville and the town of Duncan's Falls?
A. Yes, sir.
Q. There is a railroad, I believe, upon the west side of the river?
A. Yes, sir; on the bank of the canal.
Q. What amount of commerce is carried on by means of that bridge?
A. I don't think there is much travel; I don't think a great deal, sir. I never thought there would be. I lived there at the time the bridge was built, but I opposed having the bridge.
Q. I am asking the amount of travel.
A. The travel is light, in my opinion; always has been.
Q. How long since you lived there?
A. Well, I think I sold out there in—I forget the year.
Q. Fifteen or sixteen years since you lived there?
A. Yes, sir.

Recross-examination.

By Mr. HERRON:

Q. Did I understand you there was a ferry there?
A. Yes, sir.
Q. To accommodate those crossing?
A. In very low water they could cross without a ferry; in high water they run the ferry.
Q. While the State had charge of the river, wasn't it a fact that in very low and high water that navigation was impossible?
A. In high water it always was impossible; would throw so much water that they couldn't open the locks; would have to lay some time at Marietta; have to stay there sometimes two or three days.
Q. How was it when it was low?
A. Could always lock.
Q. Could always get through?
A. Yes, sir; could always lock, but it would get so low after we locked—so low that we couldn't run the level.

32 P. M. SESSION, *December* 11, 1891.

And also OLIVER DEMSTER, called on behalf of defendants, being first duly sworn, testified as follows:

Examined by Mr. WINN:

Q. Give us your name and residence, please.
A. Oliver Dempster.
Q. Where do you live?
A. Taylorsville.
Q. How long have you lived at Taylorsville?
A. A little over sixty years—that is, since I came there close to Taylorsville. It wasn't laid out at that time, 1830.
Q. How long have you known the Muskingum river, Mr. Dempster?
A. Since 1829.
Q. If I understand you, since 1829, probably, you have lived close to Taylorsville and been connected with the Muskingum river?
A. Yes, sir; in sight of Taylorsville.
Q. Do you remember the building of Taylorsville by James Taylor?
A. Yes, sir.
Q. Were you familiar with the river at Duncan's Falls prior to the building of the dam?
A. I was not. A short time prior to the building, in 1830—'29 or '30—the mill was built. I then lived in Morgan county. In '30 I moved into Muskingum county; just moved twelve miles up the river. When I came there there was a brush dam there—made of brush and stone; Taylor had.
Q. Were you familiar with the kind of stream there was there at that time below this brush dam you speak of?

A. Let me explain the brush dam. It did not cross the river; it run up 200 yards or more and turned across; went about two-thirds across the river on the east side. That was the falls.

Q. What was it called?

A. Muskingum falls.

Q. Now, I wish you would state the condition of this river below this dam made by Taylor and probably partly above Taylors-
33 ville, in this shute you speak of, as to navigation in your first knowledge of this river.

A. Well, navigation—so far as navigation was concerned, there was no navigation at all except when there came a rise in the river.

Q. Then what?

A. If it come a hard rain to raise the river, then you might get up or down with a boat—that is, a small boat. There was nothing like steamers come up except a little bit of a steamer, a small steamer. The first steamboat I ever saw at Taylorsville was in 1829, called the McClintock, a stern-wheeler, quite small thing; a little larger than a canal-boat, but not much; but it had to get back while the river was up. I come up on a rise and had to get back on a rise. If she laid at Zanesville till the water went down, she had to lay there until the water would rise again.

Q. Mr. Dempster, I wish you would describe the river below this dam before the State improvement, if you can.

A. Well, from the dam down to below where the locks now stand, where the locks now are, it was falls for about a quarter of a mile then—a ripple.

Q. Go on and describe that fully.

A. There was a ripple there, called Dead Man ripple, that was very swift and with rock bottom, that it was a good deal of trouble to push through. There was once in a while coal-boats came up from Marietta when the water was up. I have helped them through when I was a good chunk of a boy.

Q. How would they get through?

A. By laying what we called the warp; would have four or five men on deck winding on the capstan and four to ten men in the river with capstan bars, lifting, carrying it, and at the same time winding on this line anchored up the river.

Q. Where was the current in that stream—on which side?

A. Well, the most of it was on the east side of the river, on the Duncan's Falls side.

Q. You are familiar with the present location of the lock and channel?

A. Yes, sir.

34 Q. State whether the channel was on that or the other side.

A. On the other side from where they are cutting the channel now.

Q. Now, if you know, Mr. Dempster, I wish you would state the depth of water over this falls, as you call it, before the State improvement—before the building of the dam by the State.

A. Well, that's impossible. As I said before, when there came a

rain—when in low stages of the water—in low water no boats would come through—that is, in what we called dead-low water. In July, August, or September no boats would undertake to go through. In the spring for a couple of months some boats would wind through, as I said, on these little rises when it rained and the river raised.

Q. Have you any impression as to about what the depth of the water was there at low stages?

A. Well, that varied from ten to eighteen inches. I have waded it many a time myself, just with my pants rolled up.

Q. Do you know anything about the building of the dam there by the State?

A. Yes, sir.

Q. When was that done, when begun and when completed, if you know?

A. I can't tell exactly when it was commenced, either in 1836 or '7. It was built by Col. Joseph Sharp, contractor, and the dam was completed in 'forty.

Q. Now, do you know anything about *about* the building or making of the side-cut canal there?

A. Yes, sir.

Q. State when it was done.

A. Commenced that about the same time they commenced the dam, in '36 or '7; I don't know. The canal was finished in 'forty. The first steamboat that ever came up through the canal was on the first day of April, 1841.

Q. Have you been familiar with navigation by means of that side-cut canal since that time?

A. Somewhat; yes.

Q. Now, I wish you would state what navigation was carried on after the construction of that canal—the dam, canal, and locks.

A. Well, steamboats commenced running pretty regularly from Zanesville to Pittsburg.

35 Q. And navigation run through this canal?

A. No other chance; they couldn't get over the dam.

Q. Now, how did navigation compare as to prior to the building of the dam and side-cut canal as to that which took place after its building?

A. You may say there was no navigation until the dam, canal, and locks were put in. As I said before, there was coal-boats went through—small; not as large as canal-boats now. They had to be pushed and towed. As I spoke a while ago, about winding with the capstan and with from six to ten men in the river—six, eight to ten men—just as many as the boat required—and about four usually winding on the capstan, and that was all the navigation was before, except in high water.

Q. After this dam was built and the canal cut, then navigation began by means of steam?

A. Yes, sir.

Q. And commerce was carried on regularly through this canal?

A. Pretty regularly.

Q. And coal-boats abandoned?
A. None been up since as I know.

Cross-examination.

By Mr. HERRON:

Q. There was a dam built there before the State improvements?
A. A dam; yes, sir. Mr. Taylor had a dam and mill.
Q. Was there a lock in that dam for permitting boats to pass through—in the first dam?
A. A brush dam was put in first; then Mr. Taylor put in a lock—put in a frame dame—a little below where the bridge is now located.
Q. Did coal-boats pass up and down—pass through it?
A. Occasionally a coal-boat would go through that lock when they could get up to it.
Q. How often before the improvement by the State in '41 did you see a steamboat go up the Muskingum river at all?
A. I don't recollect of ever but three coming up until after.
Q. What were they?
A. The McClintoc was the first one I ever saw; then an-
36 other called Lady Byron, the largest boat that ever came up until after the locks and sam was put in, but she didn't get no further than Duncan's Falls—had to stop where Mr. Miller's mill now is; used to be a landing at the foot of the falls.
Q. What other one?
A. I can't recollect the name; might have been two or three others. I won't undertake to tell the names of any others; I don't recollect.
Q. Was there much inconvenience in navigation passing through that canal while the State had it?
A. Well, sometimes the canal would fill from washing of the bank and create a bar, but they made out to get through. At the time of a flood the wash has stopped navigation for a couple of days till they cleaned that bar out.
Q. Are you living there now?
A. When I am at home; yes, sir.
Q. Hasn't that bar had to be cleaned out during the present year three or four times?
A. Haven't used the canal this year, since the Government went to work there.
Q. Didn't that bar have to be cleaned out there three or four times a summer?
A. It just depended on how many big rains came. If there was a big rain, it had to be cleaned out; if not, it didn't.
Q. It is a fact that it had to be cleaned out three or four times?
A. Usually, and sometimes not at all, if it didn't come none of those big rains.
Q. How many times has the Government cleaned it out since it has had charge?
A. I don't think but once since the Government had it.

Q. Do you know when the Government took possession, Mr. Dempster?

A. I think two years ago last spring, maybe.

Q. Are you familiar with the location of the bridge across the river at the dam?

A. Yes, sir.

—. Where is that located with reference to the State dam?

A. It's about, perhaps, three hundred feet below the State dam—something like that. It is only guesswork, but I think it is
37 about that; maybe not that far.

Q. Mr. Dempster, have you any opinion as to the effect that floods, as you have termed them, will have upon the present channel cut out by the Government?

A. My impression — opinion is that the channel they are cutting out now will never amount to anything. Every flood is going to fill it up; every gorge in the river going to fill up in spite of faith.

38 And also JOHN MASON, called on behalf of the defendants, being first duly sworn, testified as follows:

Examined by Mr. WINN:

Q. Mr. Mason, where do you live?

A. I reside at Duncan's Falls, about three hundred yards east of the lower eastern end of this bridge in question.

Q. How long have you lived there?

A. I have lived in that immediate vicinity since '39.

Q. How long have you been acquainted with the Muskingum river?

A. Since the fall of 1839.

Q. And you have no knowledge of navigation or failure of navigation prior to that year?

A. Only as a matter of history.

Q. You have no personal knowledge?

A. No, sir.

Q. Are you familiar with the commerce that passes over this bridge at Duncan's Falls?

A. I am.

Q. I will ask you to state to what extent commerce is carried on over that bridge and what it connects—what highways, if any.

A. That bridge connects Zanesville and eastern thoroughfare from Duncan's Falls, at Taylorsville, with all that portion of Muskingum county that we might call the southwestern part of that county. The travel on that road has been largely increased within the last three or four years by reason of the location of the Zanesville & Ohio River railroad upon the western bank of the Muskingum river, which makes travel dangerous for men and horses.

Q. Prior to that time, say from the time the bridge was built down to the time of the building of the railroad, state then to what extent commerce was carried on over this bridge.

A. There was a very large increase, perhaps 300 per cent., over

and above what had been prior to that time since the building of the Z. & O. railroad; it has been increased all of a hundred per cent.

Q. If I understand you, commerce prior to the building
39 of the railroad increased about 300 per cent. over the bridge?

A. Yes, sir; prior to that, crossing by a rickety ferry-boat or in lower stages of the water by fording, the travel was very small. There was a very large increase after the building of the bridge.

Q. How did the proportion of increase over the bridge and that on the river compare?

A. I don't know that I comprehend your question.

Q. Which was greater, over the river or on the river?

A. Well, there was no commerce on that immediate river there by the means used there at that time.

Q. How did the river and the public way compare in commerce and travel?

A. By reason of the bridge being built there and people having access to it over a good thoroughfare had increased it three hundred per cent.

Q. Which was the greater, that which passed over the river or on the river by means of the side-cut canal?

A. So far as commerce carried on by river, there was none; the commerce was through that canal by steamers.

Q. Well, take the commerce carried through the canal. Now, then, which was greater, commerce carried on up and down the river by the canal or commerce over the river by the bridge?

A. Oh, that which was carried over the bridge was a local commerce. That which was carried by the river was the commerce of the world, so to speak.

Q. Which was greater?

A. That by the steamers; there was no comparison.

Q. How as to travel up and down the river?

A. Our boats were generally running with large passenger lists.

Q. How as to the travel of the people?

A. Well, that would be only a matter of opinion.

Q. That is what we want, your opinion.

A. That is a question of some difficulty. I was and have been familiar with boats and boating capacities and work doing
40 there for years, and can only say there was a large increase of travel over that river, over the former methods of crossing that river, and these boats made their trade in the passenger line of considerable magnitude.

Q. The building of the bridge increased the travel on the river?

A. No, sir; I don't say so.

Q. What did you say, then?

A. I said that the travel over that river and its relation to Zanesville as a business point was simply a local traffic; that on steamers was traffic that connected with various points on the Muskingum river.

Q. Which was greater, Mr. Mason, the travel over the river or on the river?

A. Now, do you mean by that which is the most important?

Q. Yes, sir.

A. That on the river, as a matter of course.

Q. How large a place is Taylorsville, Mr. Mason?

A. It is about five hundred inhabitants.

Q. How large is Duncan's Falls?

A. About 250 to 300.

No cross-examination.

41 And also J. F. BURGESS, called on behalf of defendants, being first duly sworn, testified as follows:

Examined by Mr. SOUTHARD:

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. A member of the board of commissioners?

A. Yes, sir.

Q. Can you state when the notice was served upon your board by the Government to remove the obstruction claimed to be caused by the bridge at Taylorsville?

A. I can't just give the date. It was some time in March.

Q. You were a member of the board at that time?

A. Yes, sir.

Q. You may state whether there were any funds in the treasury of the county available for the making of the improvement or changes required by the Government.

A. At that time there was no fund could be applied; no, sir.

Q. Were there any funds that could have been made available except by legislation?

A. I think not.

Q. Have you any doubt?

A. No; there was none.

Q. Are you able to state approximately the cost of this change required by the General Government in this bridge?

A. The probable cost, I should think, would be in the neighborhood of thirty thousand dollars.

Q. What was the earliest date under any levy that your board could make—what was the earliest date in which funds could be realized for bridge purposes—say at the date of the service of the notice in March?

A. There couldn't have been any made for that purpose without a special act of the legislature.

Q. Under a bridge levy in March, when would the levy be available?

A. Be available next March. We couldn't make a levy until next March.

Cross-examination.

By Mr. HERRON:

42 Q. How long have you been a member of the board of commissioners?

A. Two years the first of next January.

Q. When was that notice—the first notice—served on the county commissioners in reference to this change—the first notice to remove the obstruction?

A. I think in March.

Q. Didn't they notify you as early as December?

A. I don't remember of any.

Q. Didn't you give your refusal in the month of December to do anything?

A. I don't remember just when it was.

Q. When did you refuse to do it? Did you make this question of want of funds any reason for refusing?

A. I don't know that we did.

Q. Up to this point did you take any steps at any time to raise money for this purpose?

A. I think it was done.

Q. Well?

A. Our members of legislature were talked to in that matter.

Q. Did you get any authority?

A. It was too late, to near the end of the session, and nothing could be done.

Q. When was that?

A. The last of March, '91.

Q. And that was the only move?

A. Yes, sir.

Q. Had not you- board control of a fund for building bridges?

A. Not that kind of bridges.

Q. You have a bridge fund?

A. Yes; we have a bridge fund.

Q. A general bridge fund?

A. Yes, sir; but we hadn't any at that time.

Q. What time did you say you became a county commissioner?

A. Two years the first Monday in next January; in January, 1890.

Q. Wasn't a notice served in January, 1890, in regard to this obstruction?

A. There might have been a communication of some kind.

Q. Was not a regular notice served?

A. I don't remember of any.

(Objection by defendants.)

43 Q. Now, Mr. Burgess, you say this improvement, you think, would cost in the neighborhood of thirty thousand dollars?

A. I should think it would.

Q. Have you ever examined the plans submitted?

A. Yes, sir.
Q. Did you have any estimates made?
A. No.
Q. Did you refer it to the engineer for estimates?
A. No.
Q. Take any action upon them?
A. No, sir.
Q. What is your business?
A. Lumberman.
Q. Have you built any bridges?
A. Only since I have been a commissioner. What I base my judgment on is experience with other bridges we have been building.

And thereupon defendants rested.

44 And thereupon the complainant, further to maintain the issue on on its part, called in rebuttal C. E. GILLETTE, who testified as follows:

Examined by Mr. HERRON:

Q. I will ask you when you had your first communication with the county commissioners in reference to this matter.

(Testimony objected to by counsel for defendants; admitted subject to exception.)

A. I don't remember the date. There is a copy of it in the papers you have there, sir.
Q. Just look at that letter, dated January 2, 1890 (handing witness letter). Was that sent to the commissioners?
A. Yes, sir; this was served.
Q. Have you examined that plan (Exhibit "B")?
A. Yes, sir.
Q. Have you had any experience in carrying into practical operation plans of that kind?
A. No, sir.
Q. Are you able to make an estimate of the cost of the change of that bridge?
A. I could make a very close estimate of the masonry and get an estimate of the bridge.
Q. Are you able to give an estimate now?
A. Yes, sir.
Q. Have you made estimates of the cost of work of that kind?
A. I have on masonry.
Q. Have you on the iron substructure?
A. No, sir; never in detail.
Q. What would be the cost of the masonry?
A. I would have *it* figure it. The masonry would cost five or six dollars per square yard—I should say $3,300 for the masonry. It would be a little difficult to build under the bridge. If you keep the present bridge there as it is until you built the pier——

(Objection by counsel for defendants. Testimony admitted subject to exception.)

Q. What, in the best of your judgment, would be the cost
45 of making the change according to the plans and specifications?

A. The change would require a drawbridge which would be as good as the present drawbridge. I think an iron bridge of that kind could be built. I think ten thousand dollars ought to build a new iron bridge.

Q. Equal to what is there?

A. Better.

Cross-examination.

By Mr. SOUTHARD:

Q. Then, in your estimate, Lieutenant, have you taken into account the expense of cofferdams?

A. No.

Q. In making this estimate you have not had in mind the plan of bridge and superstructure required by the General Government of the board of commissioners, have you?

A. I have had in view the plans as drawn on the blue print.

Q. You have given your estimate based upon what the Government, as you understand it, is requiring of the board of commissioners?

A. Yes, sir; the Government don't require any particular kind of a bridge.

Q. You are putting an estimate upon some structure as good as the one already there?

A. Yes, sir.

Q. And not upon what a new structure, built according to modern engineering, would cost?

A. I would say as good as the county put in at Brush creek recently; it is a much shorter span.

Q. That, you think, would be about ten or twelve thousand dollars?

A. Yes, sir; a very rough estimate.

(By the COURT:)

Q. Do you include the cost of taking down the present structure?

A. That could be taken down for nothing. A great many men would take it down for nothing for it.

Redirect examination.

By Mr. HERRON:

Q. Has there been a similar bridge built below there?

A. In Morgan county. In Washington county, at Beverly, there

was a bridge built by the commissioners of Washington
46 county under the same change. The old bridge at Waterford is longer in draw-span; being in the open river, a longer draw is required than immediately below the lock. That bridge has a draw of 75 feet in the clear.

Q. Do you know what that bridge cost?

A. I don't. That was built by the commissioners of Washington county, without any legislation that I know of.

Recross-examination.

By Mr. SOUTHARD:

Q. You spoke of having the Brush Creek bridge in mind in giving your estimate?

A. No, sir; I spoke of the quality of the bridge. My estimate was that you could make as good a drawbridge as the one as Brush creek.

Q. Don't you personally know, Lieutenant, that the superstructure of that bridge itself cost over ten thousand dollars at that point?

A. I don't know. The cost of a bridge increases with the increase of the span. That bridge is 80 feet in the clear; this span is only a little over sixty. It makes a great difference.

By Mr. WINN:

Q. The notice that you referred to, Mr. Gillette, was not that a notice to remove this bridge—was it served in January?

A. I can't remember the details; but, as my memory serves me, the commissioners were regularly notified by notice of the Secretary of War exactly similar to that.

And thereupon complainant rested in rebuttal.

It is stipulated that all correspondence between the Government and parties defendant is considered in evidence and may be referred to by either party upon motion for a new trial.

And the foregoing is all the evidence offered by either party on the trial of this cause.

And thereupon the court charged the jury &, among other things, charged that Congress had the constitutional power
47 to confer upon the Secretary of War the authority to determine when a bridge such as the bridge in question is an unreasonable obstruction to the free navigation of a river, and that the failure to comply by the persons owning and controlling any such bridge as by the defendants in this case, if they should so find, with such a determination by the Secretary of War, after due notice and otherwise full compliance with the act of Congress in that behalf, lawfully subjected thereto by prosecution for a misdemeanor, as provided by the act of Congress; to all of which part of said charge defendants at the time then and there excepted.

And thereupon the jury retired and returned, after due deliberation, a verdict of guilty, as appears of record herein.

And thereupon the defendants duly filed their motion for a new

trial, which was argued by counsel and submitted to the court, as also appears of record; which motion was likewise overruled at this the June term, 1897, of this court; to which overruling of said motion defendants likewise excepted, as appears of record.

And thereupon judgment was entered against said defendants and sentence duly passed upon them; to which defendants duly excepted. And now come the defendants and present this their bill of exceptions to the court; which, being examined by the court and found to be correct, is this 24 day of November, A. D. 1897, & at the June term of this court, allowed, signed, sealed, and ordered to be made a part of the record herein.

GEORGE R. SAGE, [SEAL.]
*U. S. District Judge, S. D. O., Sitting in and Holding the U. S. Circuit Court, S, D. O.*

48 EXHIBIT A.

U. S. engineer office, custom-house.

CINCINNATI, O., *December* 19, 1890.

The commissioners of Muskingum county, O., Zanesville, Ohio.

GENTLEMEN: I have the honor to call your attention to the fact that your bridge across the Muskingum river between Taylorsville and Duncan's Falls, Ohio, has been reported by this office to the Secretary of War as an obstruction to navigation, the object being to secure an alteration of said bridge under the provisions of sections 4 and 5 of the act of Congress approved Sept. 19, 1890, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes."

This bridge is considered an obstruction to navigation by reason of the fact that it has no draw for the passage of boats desiring to navigate the Muskingum river by way of the new lock just above the south end of said bridge at Taylorsville, Ohio.

It is the purpose of this letter to afford you an opportunity to meet the complainant and to submit such statements, propositions, and evidence in reply to said complaint or bearing on the subject as you may deem pertinent. If you desire to avail yourselves of this opportunity you are requested to do so at the U. S. engineer office in Zanesville, Ohio, at 10 a. m. on Tuesday, the 6 day of January, 1890, in order to enable me to make the report on the subject that has been called for. Should you not wish to be present, I shall be pleased to receive, in writing, such statements, propositions, or evidence as you may consider responsive to the complaint on or before that day.

I send you herewith an extract from the act of Congress referred to herein, inviting your attention to the sections named.

49 Please inform me by early mail if you desire a hearing in the matter.

Respectfully, your obedient servant,

WM. E. MERRILL,
*Lieut. Col. of Engineers.*

1 inclosure. Through Lieut. C. E. Gillette, corps of engineers.

50 "D."

U. S. engineer office, custom-house.

CINCINNATI, O., *January* 8, 1891.

The commissioners of Muskingum county, Ohio, Zanesville, Ohio.

GENTLEMEN: Referring to my letters of Dec. 19, 1890, in regard to the obstruction to navigation by bridges of Muskingum county at the foot of Main street, in Zanesville, and between Taylorsville and Duncan's Falls, and to your letters of reply, dated Dec. 23, I have to inform you that the date upon which you will have an opportunity to be heard in the matter of said bridges has been postponed to Tuesday, the 3rd day of February, 1891. The hearing will be given at the U. S. engineer office in Zanesville at 10 a. m. on the date named.

Respectfully, your obedient servant,

WM. E. MERRILL,
*Lieut. Col. of Engineers.*

Through Lieut. C. E. Gillette, corps of engineers.

51 Commissioner's office, Muskingum county.

ZANESVILLE, O., *Dec.* 23, 1890.

Wm. E. Merrill, lieut. col. of engineers, Cincinnati, Ohio.

DEAR SIR: Replying to your letter of the 19th inst. in relation to bridge across the Muskingum river between Duncan's Falls and Taylorsville, would state that, as sufficient legal advice has not yet been obtained, the board desires that it be allowed till February 1, 1891, to submit to you a proposition, or report what steps it will take, if any, to remove the obstruction to navigation at said bridge.

By order of county commissioners:

J. A. KNIGHT,
*Auditor and Clerk to Commissioners.*

52 Commissioner's office, Muskingum county.

ZANESVILLE, O., *February* 3, 1891.

To the Hon. Redfield Proctor, Secretary of War, Washington, D. C.

SIR: Replying to your complaint of December 19, 1890, in reference to the Taylorsville bridge, we have to answer that upon investigation of the matter we find that prior to the time the United States Government took charge of the Muskingum river that by authority of the General Assembly of the State of Ohio a dam, locks, and canal were constructed at Taylorsville, and also prior to the construction of the bridge in question, which provided for navigation, and that the commissioners of this county, by authority granted by the General Assembly of Ohio and upon plans approved by the board of public works of Ohio, constructed said bridge and also the drawbridge across the canal at Taylorsville, which was all done before the Muskingum improvement was transferred by the

State to the United States Government. We have also submitted your complaint to the prosecuting attorney of this county for his opinion, whose opinion is that if the United States Government desires to improve or change the line of navigation of said river, and any of the bridges built by the commissioners by authority of the General Assembly of the State of Ohio and upon plans approved by the State while the State had control of said river, is an obstruction to navigation upon said changed or improved navigation, that the United States Government must make such change and be at the expense of the same. Therefore we think we are not called upon to make any change in the bridge referred to in your complaint or to take any steps for the removal of the obstruction complained of by the United States Government.

53 Very respectfully,

F. M. RIDER,
J. F. BURGESS,
L. M. RUTLEDGE,
*County Commissioners.*

54 "An act to authorize county commissioners to cause bridges to be constructed on certain public highways in incorporated villages.

"SEC. 1. Be it enacted by the General Assembly of the State of Ohio, That the county commissioners of the several counties in this State shall be authorized and required to cause to be constructed and kept in repair, in the manner prescribed by law, all necessary bridges in incorporated villages and all cities not having the right to demand and receive any portion of the bridge fund levied upon property within such cities in their respective counties, on all State and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads, which are of general and public utility, running into or through any such incorporated village or city."

(Passed March 30, 1872.)

55 SEPTEMBER 2, 1874.

Ordered that the board does hereby approve of the plan of the bridge (a duplicate of which is retained in this office) across the Muskingum river, at Taylorsville, and that the acting commissioner on division No. 2 (Mr. Hosmer) be directed to indorse this approval thereon.

Vol. 8, General Records, B. P. W., p. 222.

MAY 6, 1884.

Ordered that the commissioners of Muskingum county be, and they are hereby, authorized to construct and maintain a draw or swing bridge across the canal at Taylorsville, on the Muskingum improvement. Said bridge is to be located near the guard-lock and on an alignment with the county bridge as located across the Muskingum river, and to be built in accordance with plans filed in the office of the board of public works and under the direction of the chief engineer or assistant engineer or superintendent in charge o

that division of the public works, and said county will be held liable for any damage that may be caused by neglect to properly maintain said bridge.

Vol. 9, General Records, B. P. W., p. 213.

*Extract from Deed from State of Ohio to the United States, Conveying the Muskingum River Improvement.*

Know all men by these presents, that whereas, on the fourteenth day of May, A. D. 1886, a joint resolution was passed by the General Assembly of the State of Ohio, wherein, after referring to the paragraph contained in H. R. bill No. 7480, then under deliberation in the Congress of the United States, providing an appropriation for "the improvement of the Muskingum river, Ohio, between Zanesville and the mouth of the river," and also providing for the acceptance by the United States from the State of Ohio of the said improvement, and all the property, rights, etc., appertaining
56 thereto, it was by said General Assembly resolved "that upon the passage of the act aforesaid (meaning said H. R. bill No. 7480) by the Congress of the United States and its approval by the President, the State of Ohio hereby consents to all of the provisions in said act named, and the board of public works is hereby directed to transfer to the proper officers of the United States all the property, money, rights and franchises in said act named, upon the fifteenth day of July, A. D. 1886, or so soon thereafter as may be demanded by the United States;" and whereas the said H. R. bill No. 7480, with the provisions therein, to which reference is made in said joint resolution, has been passed by Congress and approved by the President and so has become a statute of the United States known as the river and harbor act of August 5, 1886, chap. 929; and whereas demand has been made by the United States through its proper officers for the transfer of the hereinafter-described property agreeable to the provisions of said joint resolution; and whereas at a meeting of the board of public works of the State of Ohio, held on the 11th day of January, A. D. 1887, at Columbus, Ohio, it was by said board resolved "that in the exercise of the power conferred upon the board of public works by the joint resolution of the General Assembly of Ohio, passed May 14, 1886, the president of this board be, and he is hereby directed in its name to execute and deliver a deed transferring to the United States all of the property, together with the rights and franchises thereto belonging, now owned, held and enjoyed by the State of Ohio in and to the Muskingum River improvement in said joint resolution mentioned or referred to:" Now, therefore, the board of public works of the State of Ohio, in consideration of the premises, and by virtue of the power conferred upon it as above, doth hereby transfer, grant and convey to the United States of America forever the following-described real property:

* * * * * * *

And also such other real property whatsoever as the State
57 of Ohio may now be seized or embraced in and appertaining to that portion of the property thereof, known as the Mus-

kingum River improvement mentioned in said H. R. bill No. 7480, hereby intending to transfer to the United States of America all the lands and tenements, with the rights and appurtenances thereto, now belonging to the State of Ohio and heretofore occupied and used for canal and other purposes, and known as the said Muskingum River improvement.

In witness whereof, the president of the said board of public works, hath, by virtue of the authority in him vested, hereunto signed its name and affixed its seal, this thirty-first day of January A. D. 1887.

[SEAL.] THE BOARD OF PUBLIC WORKS
OF THE STATE OF OHIO,
(Signed) By JOHN P. MARTIN, *President.*

58 U. S. engineer office, custom-house.

CINCINNATI, OHIO, *Oct.* 16, 1889.

Lieutenant C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: In order to begin proceedings against the bridge at Duncan's Falls, it is necessary to have a map that will show the relations between the new lock and the bridge. Please forward such a map at your earliest convenience.

Your obedient servant, WM. E MERRILL,
*Lt. Col. of Engineers.*

(Copy.)

59 U. S. engineer office, custom-house.

CINCINNATI, O., *Oct.* 28, 1889.

Lieut. C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: You will please notify the commissioners of Muskingum county, Ohio, that the construction of the new lock at Taylorsville has made it necessary to place a draw in their Taylorsville bridge, just below the lock, and ask them if they are willing to construct this draw within a reasonable time.

I think there is no doubt as to the authority of the Government to compel the erection of the draw in question, and therefore I hope that the commissioners will accept the situation frankly, and not give us the annoyance and the county the expense of striving against the inevitable.

Please see the commissioners personally and find out their views in the matter. I am anxious to save them as well as myself the bother of an appeal to the authorities, and if they will promise to have the draw inserted next summer, I will take no official steps in the matter. It is necessary, however, that I should have their decision before long.

Your obedient servant, WM. E. MERRILL,
*Lt. Col. of Engineers.*

(Copy.)

60 United States engineer office.

ZANESVILLE, O., *Nov.* 22, 1889.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: I have to transmit herewith tracing showing the Taylorsville bridge, with the correct location of new lock No. 9. I have communicated verbally with the commissioners, but have not yet reached any satisfactory solution of the question of altering the bridge, shutting off the canal, etc.

Very respectfully, CASSIUS C. GILLETTE,
*1st Lieut. of Engineers.*

(Copy.)
(Inclosure in separate package.)

61 United States engineers' office.

ZANESVILLE, OHIO, *January* 6, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: Referring to the matter of the draw in the Taylorsville bridge below new lock No. 9, the county commissioners, without expressing an opinion as to the legal merits of the case, decline to make any alterations in the Taylorsville bridge without they are compelled to do so. They give as a reason for this that they wish to protect themselves against criticism from the tax-payers. If ordered to alter the bridge, they propose to employ legal talent toward resisting it.

Very respectfully, CASSIUS E. GILLETTE,
*1st Lieut. of Eng'rs.*

(Copy.)

62 U. S. engineer office, custom-house.

CINCINNATI, O., *January* 22, 1890.

The commissioners of Muskingum county, Ohio, Zanesville, Ohio.

GENTLEMEN: Upon the report of this office that the Muskingum County bridge across the Muskingum river, between Taylorsville and Duncan's Falls, Ohio, will be an obstruction to navigation upon the completion of the new lock at Taylorsville, now in process of construction by the United States, from the fact that it is not provided with a drawbridge over the channel below the lock, I have been directed by the Chief of Engineers to communicate with you with a view of securing an alteration of said bridge under the provision of the 9th section of the act of Congress of Aug. 11, 1888, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes."

It is the object of this letter to afford you an opportunity to submit such statements, propositions, and evidence bearing upon the matter as you may deem pertinent. If you desire to do this, you are requested to do so on the 4th day of February next, at 12 m., at the U. S. engineer office in Zanesville, O., in order to enable this

office to make the report upon the subject which has been called for. Should you not wish to be present I shall be pleased to receive, in writing, such statements, propositions, or evidence as you may consider responsive to the complaint on or before that day. Please inform me by early mail if you desire a hearing in the matter.

Respectfully, your obedient servant,

WM. E. MERRILL,
*Lt. Col. of Engineers.*

Through Lieut. C. E. Gillette, corps of engineers.

(Copy.)

63 U. S. engineer office.

ZANESVILLE, O., *January* 24, 1890.

The commissioners of Muskingum county, Ohio, Zanesville, Ohio.

GENTLEMEN: I have to transmit herewith a letter from Colonel Merrill, dated January 22, 1890, concerning the Taylorsville and Duncan's Falls bridge.

CASSIUS E. GILLETTE,
*1st Lieut. of Engineers.*

(Copy.)

64 Auditor's office, Muskingum county.

ZANESVILLE, O., *January 24th*, 1890.

Lieut. C. E. Gillette, U. S. engineer's office, Zanesville, Ohio.

DEAR SIR: Your communication addressed to the commissioners of this county in regard to obstruction to navigation at Taylorsville is rec'd, and in reply I am instructed to say to you that they will appear before you at your office on the day named, viz., Feb. 4, 1890.

Very respectfully, J. A. KNIGHT,
*Auditor & Clerk to County Commissioners.*

(Copy.)

65 United States engineer office.

ZANESVILLE, O., *Feb.* 1, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, O.

SIR: The map of the Taylorsville and Duncan's Falls bridge is in your office, our duplicate not being yet prepared for want of time. As it will probably be wanted next Tuesday, I would suggest that your copy be returned temporarily to this office. If this is impracticable for any reason, please telegraph me on Monday and I will have another copy ready.

The masonry of new lock No. 9 is completed, and Tuesday afternoon would be a good time to inspect it, if the business with the commissioners is completed by that time, or it might be well to visit the ground with one or more of the commissioners.

Very respectfully, CASSIUS E. GILLETTE,
*1st Lieut. of Engineers.*

(Copy.)

66 U. S. engineer office, custom-house.

CINCINNATI, O., *February* 3, 1890.

Lieut. C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: As requested in yours of the 1st inst., I send herewith the tracing showing the Taylorsville and Duncan's Falls bridge.

As the commissioners of Muskingum county failed to answer my letter, although particularly requested to do so, I have made no arrangements to go to Zanesville and am not certain at this writing that I can get there. If I do not put in an appearance, please act for me and submit a report, returning this tracing and inclosing whatever documents the commissioners may desire to send.

Your obedient servant, WM. E. MERRILL,
*Lieut. Col. of Engineers.*

(Copy.)
(1 inclosure. Incl. 1 of 340, 1890.)

67 Commissioners' office, Muskingum county.

ZANESVILLE, O., *February* 4, 1890.

W. E. Merrill, lieut. col. of engineers.

DEAR SIR: Replying to yours of the 22nd ult., would state that the undersigned commissioners decline to take any steps towards placing a draw in the Taylorsville bridge on the grounds that the bridge was built under proper authority and was not an obstruction to navigation, as the same was provided for by a draw-span over the canal. The abandonment of the canal and requirement of a channel through what is now a continuous span was the act of the United States authorities, and said commissioners insist that the Government should bear the expense of making the change in the bridge.

Respectfully,
C. W. M'CUTCHEON,
FRANCIS M. RIDER,
J. F. BURGESS,
*Commissioners of Muskingum County, Ohio.*

(Copy.)

68 ZANESVILLE, O., *Feb.* 7, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, O.

SIR: I have to transmit herewith a letter from the commissioners of Muskingum county concerning the Taylorsville bridge. It contains the subject-matter of their views at the meeting on February 4, which they attended.

The reason of their not replying to your letter was the fact that they thought they had fulfilled the requirements when they sent a response addressed to me, and I rather carelessly assumed that they would send a letter to you by mail. However, the material they had to present was not such as would have required a meeting at all.

Very respectfully, CASSIUS E. GILLETTE,
*1st. Lieut. of Eng'rs.*

(Copy.)
1 inclosure.

69 U. S. engineer office, custom-house.

CINCINNATI, O., *February* 8, 1890.

Lieut. Cassius E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: I have to acknowledge the receipt of the letter from the commissioners of Muskingum county, Ohio, declining to take any steps towards placing a draw in the Taylorsville bridge.

They take the ground that the bridge as it stands is no obstruction to navigation through the old channel via the canal. I wish therefore that you would report on the relations to navigation of the existing drawbridge. It is my impression that it is an obstruction, and would have required alteration had the canal been maintained.

Your obedient servant, WM. E. MERRILL,
*Lt. Col. of Engineers.*

(Copy.)

70 United States engineers' office.

ZANESVILLE, O., *February* 14, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: Replying to your letter of February 8 concerning the Taylorsville drawbridge, I have to report that I examined our office records, the original drawing of the bridge, and the bridge itself, and I find that no complaint could have been well entered against it as an obstruction to navigation through the canal. The span is over 40 feet at low-water mark and the foundations are 10 feet below low water, the masonry nearly new and substantially constructed.

Very respectfully, CASSIUS E. GILLETTE,
1*st Lieut. of Eng'rs.*

(Copy.)

71 United States engineer office.

ZANESVILLE, O., *February* 15, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: I have to return herewith map showing location of new lock No. 9 and proposed draw of bridge below lock, at Taylorsville Ohio.

Very respectfully, CASSIUS E. GILLETTE,
1*st Lieut. of Eng'rs.*

1 inclosure.
Copy.

72 Auditor's office, Muskingum county.

ZANESVILLE, O., *August* 9, 1890.

Cassius E. Gillette, 1st lieut. of engineers.

DEAR SIR: Acting under suggestion in your communication of the 24th ult., we wrote Congressman Owens of this district to confer with the Secretary of War and determine, if possible, what will be

the legal outcome in case of litigation between the U. S. authorities and county commissioners with reference to the Taylorsville draw.

By order of commissioners:

J. A. KNIGHT, *Auditor.*

(Copy.)

73 United States engineer office.

ZANESVILLE, O., *August* 11, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

DEAR SIR: I enclose copy of lettter received from the commissioners of Muskingum county in reference to the Taylorsville drawbridge.

I will notify you of the result of the conference mentioned as soon as I learn it.

Very respectfully, CASSIUS E. GILLETTE,
1*st Lieut. of Eng'rs.*

(Copy.)

74 Commissioners' office, Muskingum county.

ZANESVILLE, O., *August* 20, 1890.

Hon. Redfield Proctor, Secretary of War, Washington, D. C.

SIR: Your notice of date August 8, 1890, relative to alteration of bridge at Taylorsville, on the Muskingum river, in this, Muskingum, county, is at hand and contents carefully noted. Upon due consideration, the board of county commissioners have decided that they are not responsible for the obstruction named, and respectfully decline to take any action in the premises without a decision of the proper court.

Very resp'y, C. W. M'CUTCHEON,
F. M. RIDER,
J. F. BURGESS,
*County Commissioners.*

(Copy.)

75 United States engineer office.

ZANESVILLE, O., *August* 23, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: I have to transmit herewith a letter to the Secretary of War from the commissioners of Muskingum county, replying to his order of August 8, 1890, requiring alterations of the bridge at Taylorsville. Since this bridge will be an obstruction to navigation until it is open, would recommend that steps be taken to bring it into court as soon as possible.

Very respectfully, CASSIUS E. GILLETTE,
1*st Lieut. of Engineers.*

(Copy.)
1 inclosure.

76 U. S. engineer office, custom-house.

CINCINNATI, O., *Dec.* 8, 1890.

Lieut. C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: To enable this office to reply to a call from the office of the Chief of Engineers, I have to request information as to the steps thus far taken by the parties in interest looking to a compliance with the orders of the Secretary of War as to modification of bridges over the Muskingum river at the following localities:

1. Taylorsville & Duncan's Falls.

Your obedient servant,

WM. E. MERRILL,
*Lieut. Col. of Engineers.*

(Copy.)

77 Muskingum River improvement, U. S. engineer office.

ZANESVILLE, O., *December* 9, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: Replying to your letter of December 8, about bridges at Taylorsville and Marietta, I have to inform you that the county commissioners have done nothing toward altering the Taylorsville bridge since their last interview with you.

There is no data on file in this office concerning the Marietta & Harmar Railroad bridge. I believe, however, that no steps have been taken to alter it.

Very respectfully,

CASSIUS E. GILLETTE,
1*st Lieut. of Engineers.*

(Copy.)

78 U. S. engineer office, custom-house.

CINCINNATI, O., *December* 19, 1890.

The commissioners of Muskingum county, O., Zanesville, Ohio.

GENTLEMEN: I have the honor to call your attention to the fact that your bridge across the Muskingum river between Taylorsville and Duncan's Falls, Ohio, has been reported by this office to the Secretary of War as an obstruction to navigation, the object being to secure an alteration of said bridge under the provisions of sections 4 and 5 of the act of Congress approved Sept. 19, 1890, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes."

This bridge is considered an obstruction to navigation by reason of the fact that it has no draw for the passage of boats desiring to navigate the Muskingum river by way of the new lock just above the south end of said bridge at Taylorsville, Ohio.

It is the purpose of this letter to afford you an opportunity to meet the complainant and to submit such statements, propositions, and evidence in reply to said complaint or bearing on the subject as you may deem pertinent. If you desire to avail yourself of this

opportunity, you are requested to do so at the U. S. engineer office in Zanesville, Ohio, at 10 a. m. on Tuesday, the 6th day of January, 1891, in order to enable me to make the report on the subject that has been called for. Should you not wish to be present, I shall be pleased to receive in writing such statements, propositions, or evidence as you may consider responsive to the complaint on or before that day.

I send you herewith an extract from the act of Congress
79 referred to herein, inviting your attention to the sections named.

Please inform me by early mail if you desire a hearing in the matter.

Respectfully, your obedient servant,

WM. E. MERRILL,
*Lieut. Col. of Engineers.*

1 inclosure through Lieut. C. E. Gillette, corps of engineers.
(Copy.)

80 Commissioners' office, Muskingum county.

ZANESVILLE, O., *Dec.* 23, 1890.

Wm. E. Merrill, lt. col. of engineers, Cincinnati, Ohio.

DEAR SIR: Replying to your letter of the 19th inst., in relation to bridge across the Muskingum river between Duncan's Falls and Taylorsville, would state that as sufficient legal advice has not yet been obtained that the board desires until February 1, 1891, to submit to you a proposition or report what steps it will take, if any, to remove the obstruction to navigation at said bridge.

By order of county commissioners:

J. A. KNIGHT,
*Auditor and Clerk to Commissioners.*

(Copy.)

81 U. S. engineer office.

ZANESVILLE, O., *December* 24, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: I have to transmit herewith letters from the commissioners of Muskingum county asking that their answers in the matters of the Main Street and Taylorsville bridges be not required before February 1st, 1891.

Very respectfully, CASSIUS E. GILLETTE,
*1st Lieut. of Engineers.*

2 inclosures.
(Copy.)

82 U. S. engineer office.

ZANESVILLE, O., *February* 3, 1891.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: I have to inform you that the county commissioners of this county were today given a hearing in the matters of the bridge at

Main street, in Zanesville, and the Taylorsville-Duncan's Falls bridge in accordance with your letters of December 19, 1890. The commissioners stated that they would decline to make the changes required in the bridges and submitted letters suggesting that the matter be referred, on an agreed statement of facts, to the United States court for this district; but, on ascertaining that they had not yet been ordered to make the changes under the act approved September 19, 1890, they withdrew those letters and subsequently submitted two letters, which are inclosed herewith.

I would suggest that a recommendation be sent the Secretary of War that the necessary orders for the alteration of the bridge be sent immediately, and that the time for making the alteration be limited to one month. In order that such limitation should not appear unreasonable, the order should state that the time would be extended at the request of the commissioners, if made before the expiration of the month. The reason of this is that the commissioners will not make the alteration until they are ordered to by the courts, and the sooner the matter is thrown into the courts the better it will be for all parties concerned, since the bridge can be altered best next season under cover of the Government cofferdam. This applies to the bridge at Taylorsville.

The commissioners are anxious to get the matter into the courts as soon as possible, and it was their suggestion that the time for completion be limited. I do not know the time of the session
83 of the courts, but the matter ought to be brought before the present or the next session.

Very respectfully, CASSIUS E. GILLETTE,
*1st Lieut. of Engineers.*

2 inclosures.

84 U. S. engineer office, custom-house.

CINCINNATI, O., *Feb.* 4, 1891.

Lieut. C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: The order of the Chief of Engineers requires that I shall specify "the changes that will be required to render navigation through or under the bridge free, easy, and unobstructed." Please therefore submit tracings showing alterations required in bridges at Taylorsville and at foot of Main street, in Zanesville, with special reference to the location and width of draws required.

Your obedient servant, WM. E. MERRILL,
*1st Lieut. of Engineers.*

(Copy.)

85 U. S. engineer office.

ZANESVILLE, O., *February* 10, 1891.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: As directed in your letter of February 4, I have to transmit herewith tracings showing the head of the canal at Zanesville and the head of the canal at Taylorsville, with reference to the location

and width of the draws required in the county bridges at those points.

At Taylorsville I have shown a clear width of 62 feet, which gives only a reasonable entrance to the lock for boats. It allows a pivot pier of reasonable size in the middle of the present span. I have shown the shore line about in its present state at low water, but it will be changed somewhat as the channel is opened.

Very respectfully, CASSIUS E. GILLETTE,
*1st Lieut. of Engineers.*

2 inclosures in separate packages.

86 WAR DEPARTMENT,
WASHINGTON CITY, *Feb.* 25, 1891.

To the county commissioners of Muskingum county, Ohio:

Take notice that whereas the Secretary of War has good reason to believe that the bridge owned and controlled by Muskingum county, Ohio, across the Muskingum river, between Taylorsville and Duncan's Falls, Ohio, is an unreasonable obstruction to the free navigation of the said river (which is one of the navigable waters of the United States), on account of not being provided with a draw-span below the new United States lock No. 9, in said river;

And whereas the following alterations will render navigation through it reasonably free, easy, and unobstructed, to wit, the construction of a draw-span in said bridge below the said lock, in accordance with the plan shown on the map hereto attached;

And whereas to the 30th day of September, 1891, is a reasonable time in which to alter the said bridge as described above:

Now, therefore, in obedience to and by virtue of the fourth and fifth sections of an act of Congress of the United States entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved September 19, 1890, Redfield Proctor, Secretary of War, does hereby notify the said County Commissioners of Muskingum County, Ohio, to alter the said bridge as described above, and prescribe- that said alteration shall be made and completed on or before the 30th day of September, 1891.

L. A. GRANT,
*Assistant Secretary of War.*

(Copy.)

87 U. S. engineer office, custom-house.

CINCINNATI, OHIO, *March* 21, 1891.

Lieut. C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: Your letter of the 20th inst., with accompanying letters from the commissioners of Muskingum county, is at hand.

No copies of the orders of the Secretary of War in regard to alterations of bridges at the foot of Main street, in Zanesville, and at Taylorsville, Ohio, are on file in this office.

Your obedient servant, W. E. MERRILL,
*Lieut. Col. of Engineers.*

(Copy.)

88 U. S. engineer office, custom-house.

CINCINNATI, OHIO, *Oct.* 9, 1891.

Lieut. C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: Please send me the names of the commissioners of Muskingum county by return mail. These names are desired by the district attorney in connection with proceedings to compel alterations of the Taylorsville bridge.

Your obedient servant, WM. E. MERRILL,
*Lieut. Col. of Engineers.*

(Copy.)

89 U. S. engineer office.

ZANESVILLE, O., *October* 31, 1891.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: I am requested by Commissioner Chandler to ask you to inquire of the district attorney what disposition he wishes made of the blue print showing Taylorsville bridge, which was part of the evidence at the hearing this morning.

Very respectfully, CASSIUS E. GILLETTE,
*1st Lieut. of Engineers.*

(Copy.)

90 U. S. engineer office, custom-house.

CINCINNATI, O., *Nov.* 2, 1891.

Lieut. W. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: In reply to your letter of the 31st ult. I have to state that the district attorney brought back with him the only blue print of which he has any knowledge, but he adds: "However, if the paper in question is not claimed by the defendants, the commissioner may remit it to this office or attach it to the transcript which he will forward to the U. S. clerk, District of Columbus."

Your obedient servant, WM. E. MERRILL,
*Lieut. Col. of Engineers.*

(Copy.)

91 UNITED STATES OF AMERICA:

WAR DEPARTMENT,
WASHINGTON CITY, *October* 15, 1891.

Pursuant to section 882 of the Revised Statutes, I hereby certify that it appears from the records of the office of the Chief of Engineers, U. S. Army, that the annexed are authenticated copies of papers on file in that office.

THOS. LINCOLN CASEY,
*Brig. Gen., Chief of Engineers.*

Be it known that Thos. Lincoln Casey, who signed the foregoing certificate, is the Chief of Engineers, United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand and caused the seal of the War Department to be affixed on this 15th day of October, one thousand eight hundred and ninety-one.

[SEAL.]

L. A. GRANT,
*Acting Secretary of War.*

92 WAR DEPARTMENT,
WASHINGTON CITY, *February* 25, 1891.

To the County Commissioners of Muskingum County, Ohio:

Take notice that—

Whereas the Secretary of War has good reason to believe that the bridge owned and controlled by Muskingum county, Ohio, across the Muskingum river between Taylorsville and Duncan's Falls, is an unreasonable obstruction to the free navigation of the said river (which is one of the navigable waters of the United States), on account of not being provided with a draw-span below the new United States lock No. 9 in said river;

And whereas the following alteration will render navigation through it reasonable free, easy, and unobstructed, to wit, the construction of a draw-span in said bridge below the said lock in accordance with the plan shown on the map hereto attached;

And whereas to the 30th day of September, 1891, is a reasonable time in which to alter the said bridge as described above:

Now, therefore, in obedience to and by virtue of the fourth and fifth sections of an act of the Congress of the United States entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved September 19, 1890, Redfield Proctor, Secretary of War, does hereby notify the said county commissioners of Muskingum county, Ohio, to alter the said bridge as described above, and prescribe- that said alteration shall be made and completed on or before the 30th day of September, 1891.

L. A. GRANT,
*Assistant Secretary of War.*

(Here follows map marked p. 93*a*.)

93 And afterwards, to wit, on the 14th day of May, A. D. 1892, there was filed in the clerk's office of the court aforesaid a certain opinion of Judge Sage in this cause; which said opinion is clothed in the words and figures following, to wit:

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

*Opinion of Judge Sage.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE UNITED STATES
*vs.*
FRANK M. RIDER, JOHN F. BURGESS, SAMUEL M. RUTLEDGE, County Commissioners of Muskingum County, in the State of Ohio.

This case is before the court on motion for new trial. The defendants are prosecuted under an information founded upon the fourth and fifth sections of the river and harbor act, approved September 19, 1890. The charges are, in short, that on the 15th day of October, 1891, the defendants were the County Commissioners of Muskingum County, Ohio, and as such empowered by the law of Ohio to construct, alter, and keep in repair all necessary bridges over streams and public canals on all State and county roads, and then and there had control of the bridge across the Muskingum river, between Taylorsville and Duncan's Falls, and the Secretary of War of the United States having good reason to believe that said bridge was an unreasonable obstruction to the navigation of said river—a navigable stream over which the United States has jurisdiction—on the 19th of December, 1890, gave written notice to the defendants that said bridge was considered an obstruction to navigation by reason of the fact that it had no draw for the passage of boats by way of the new lock just above the south end of the new bridge at Taylorsville, Ohio, and in order to afford defendants a reasonable opportunity to be heard and give evidence in regard to said complaint the sixth of January, 1891, was named and a place fixed for that purpose; that the time was extended to the third of February, 1891, and that on the 25 of February, 1891, the Secretary gave written notice to the defendants that said bridge was an
94 unreasonable obstruction to the free navigation of said river, for the reason above stated, and required the construction of a draw-span therein in accordance with plans shown in a map attached to said notice and served upon the defendants. Said notice prescribed that said draw-span should be made and completed within a reasonable time, to wit, on or before the 30th of September, 1891, and that personal service of said notice was made on the 3rd of March, 1891; that afterwards the defendants, on, to wit, the 15th day of October, 1891, after receiving said notice, did unlawfully fail and refuse to comply with the order of the Secretary and to make the alterations aforesaid, contrary to the form of sections four and five of the act above referred to. Those sections are as follows:

SEC. 4. That section nine of the river and harbor act, of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to reas as follows:

That whenever the Secretary of War shall have good reason to

believe that any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account if insufficient height, width of span or otherwise, or where there is difficulty in passing the draw-opening or the draw-span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that
95 the criminal proceedings mentioned in the succeeding section may be taken.

SEC. 5. That section ten of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

That if the persons, corporations, or associations owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the Secretary of War and within the time prescribed by him wilfully fail or refuse to remove the same, or to comply with the *pawful* order of the Secretary of War in the premises, such persons, corporations or associations shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, and every — such persons, corporations or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation or association so offending to the penalties above prescribed.

Upon the trial, the evidence being in, a *pro forma* verdict of guilty was taken by consent, with the understanding that the questions of law involved should be presented and considered on motion for new trial. There are two questions, as follows:

1. Was the notice to the defendants reasonable? The charges of the information in regard to the notice were established by the evidence and are not disputed. It has been held that where the facts are clear, what is reasonable notice or reasonable time is always a question exclusively for the court. Toland *v.* Sprague, 12 Peters, 336; Wiggins *v.* Burkham, 10 Wallace, 132. It appears from the evidence that at the time of the service of said notice the defendants had no funds with which to make the required change, and that under the statute of Ohio they as commissioners could only make levies for bridge purposes at their March or June session in each year, one-half of which would be collectible not be-
96 fore the 20th of December of such year and the other half not before the 20th of June of the year following. It also appears from the evidence that the defendants applied for legisla-

tion authorizing them to raise the funds with which to make the change required, and that their application failed, and the defendants introduced evidence tending to prove that the cost of the required change will exceed the sum of $10,000, which, however, is denied by witnesses for the Government. The defendants, under the statutes of Ohio, cannot expend in constructing, altering, or repairing any bridge a sum in excess of $10,000 without special authority from the legislature or without submitting the same to a vote of the people of the county at some general election, and there was no general election after the service of notice excepting the spring election on the first Monday of April and the State election on the first Tuesday after the first Monday of November. The first of these dates was too early after the notice and the last was after the limit prescribed by the notice. The defendants had no authority in the matter excepting as county commissioners. They had no bridge fund to draw upon and no authority of law to incur any obligation excepting upon their individual responsibility. It would be manifestly unreasonable to expect them to proceed without the authority of local law and without money, upon their own responsibility, to incur the expense involved in making the required changes, whether the cost would have been less or more than $10,000. The notice was not reasonable, and therefore, if upon no other ground, the verdict must be set aside.

2. The main question, and that which goes to the root of the matter, is whether Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by the act. In accordance with its terms, whenever he has good reason to believe that a bridge is an unreasonable obstruction to navigation, he is to give notice to the parties owning or controlling the same,
97 after first giving them reasonable opportunity to be heard, to make such alterations as he may specify, and upon their failure or refusal to make the same within a reasonable time, they are to be deemed guilty of a misdemeanor, and the Secretary of War may direct the institution of criminal proceedings. The power of the Secretary depends upon his having adjudged that the bridge is an obstruction, and his adjudication is made final and conclusive. This is judicial power. The question is one of fact or a mixed question of law & fact, and it cannot be determined by a court without a jury unless the defendant consent. It was held in Grant *v.* Raymond, 6 Peters, 242, Chief Justice Marshall announcing the decision, that the Secretary of State of the United States is not an officer in whom, under the Constitution, judicial power can be vested. In that case the Secretary had gone through with the form of reissuing a patent for an invention. It is true that there was not then any statute authorizing a reissue. The original patent had been granted by the President, signed by him, and countersigned by the Secretary. It was returned to the Patent Office and cancelled, owing to the defective specification on which it was issued, and another patent issued with a corrected specification. The argument in favor of the reissue was that the Department of State had clearly the right to correct an inadvertent or innocent mistake. But the court said

that the question of inadvertance or mistake was a judicial question, which could not be decided by the Secretary of State. It is also true that within a few months after the decision of that case Congress enacted a statute making it lawful for the Secretary of State, upon the surrender of a patent invalid or inoperative by reason of inadvertance, accident, or mistake, as specified in the act, to cause a new patent for the same invention, and for the residue of the term of the original patent, to be issued, the reissued patent to be liable to the same defenses as the original, and that subsequently the authority was vested in
98 the Commissioner of Patents, with whom it remains to this day. But there is this radical difference between the case of a reissued patent and the case now before the court. The patent, original or reissued, is only *prima facie* evidence of an exclusive right in the patentee, and it is open to all defences, inclusing in the case of a reissued patent those involving an investigation into the question whether there was in fact any such inadvertance, accident, or mistake as was requisite to authorize the reissue, while here the Secretary of War finds and decides conclusively and finally whether the bridge is an obstruction, what changes shall be made, and within what time, and the only questions left open to be tried in the criminal prosecution for misdemeanor which he is authorized to set on foot are whether he has made the findings and decision, ordered the changes, given the proper notices, and whether the defendants have complied with his orders.

In this case the bridge was built about 1874, by the Board of Commissioners of Muskingum County, by virtue of a grant from the State of Ohio under the act of the legislature of March 25, 1870. The Muskingum river is entirely within the State of Ohio. Since 1838, and until the date hereinafter mentioned, it has been under the control of the State through its board of public works, which maintained a system of slack-water navigation until the session of the river and its improvements by the State of Ohio to the Federal Government, March 21, 1887. Since that time the General Government has caused to be constructed, in a dam at the head of rapids above said bridge, on its west side and under the bridge, an artificial channel. It has also raised the locks and dam on the river below, thus raising the level of the water above some four feet. These improvements and changes furnished the occasion alleged for requiring the proposed changes in the bridge.

The right of the State of Ohio to erect or authorize bridges
99 over the river which should not interfere with its navigation is conceded, and that such bridges were lawful structures; but it is urged for the Government that they were built subject to the power of Congress at any time to act upon the subject of the navigation of the river, and to define what structures should be regarded as interfering with that navigation, citing Gilman *v.* Philadelphia, 3 Wall., 731. There is a long series of cases decided by the Supreme Court and cited in U. S. *v.* Keokuk and H. Bridge, 45 Fed. Rep., at page 180, sustaining the general proposition as above stated; but the question to be here decided is whether Congress

could delegate, as it has undertaken to do, its authority in the premises to the Secretary of War. My conclusion is that it could not. The reasons for this conclusion are so well and so fully set forth by Judge Shiras in U. S. *v.* Keokuk and H. Bridge, cited above, that it is sufficient to refer to that case, and to express, as I do, my concurrence in the reasoning and conclusions of the opinion therein.

The verdict against the defendants will be set aside and the judgment of the court will be that sections four and five of the river and harbor act of September 19, 1890, upon which the information is based, are unconstitutional, and that the defendants go hence without day.

GEO. R. SAGE,
*U. S. District Judge.*

May 14, 1892.

100 And afterwards, to wit, on the 15th day of June, A. D. 1896, there was filed in the clerk's office of said court a certain mandate from the Supreme Court of the United States in this cause; which said mandate is clothed in the words and figures following, to wit:

*Mandate.*

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Whereas lately, in the circuit court of the United States for the southern district of Ohio, before you, in a cause between The United States, plaintiff, and Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, commissioners of Muskingum county, Ohio, wherein the judges were opposed in opinion on certain points or questions which were certified, under the seal of the said circuit court, to the Supreme Court of the United States for its opinion, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and ninety-five, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that this certificate be, and the same is hereby, dismissed. Whereupon it is now here ordered and adjudged by this court that it be so certified to the said circuit court, and the same is accordingly hereby certified.

May 18, 1896.

You therefore are hereby commanded that such proceedings be had in said cause as according to right and justice and the laws of

the United States ought to be had, the said certificate not-
101 withstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of June, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

And afterwards, to wit, on the 1 day of June, A. D. 1897, an entry was made upon the journal of said court in said cause; which said entry is clothed in the words and figures following, to wit:

Entry, C. 235.

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
*versus*
FRANK M. RIDER ET AL., Defendants. } No. 211.

*Entry Overruling Motion for New a Trial.*

This day this cause came on further to be heard upon the motion of the defendants for a new trial, and it appearing to the court that the questions heretofore reserved upon the trial of this cause for hearing and decision by the court, to wit: 1st, Whether Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by S. 4 and S. 5 of the act of Congress of September 19th, 1890, to determine when a bridge is an unreasonable obstruction to the free navigation of a river; 2nd, Whether the failure to comply by persons owning and controlling the said bridge with said determination of the Secretary of War can lawfully subject them to a prosecution for a misdemeanor; upon which said questions the Honorable William H. Taft, United States circuit judge, and the Honorable George R. Sage, United States district judge in and for the southern district of Ohio, were upon the hearing thereof divided in opinion; and it appearing, further, that by reason of said division the said points of disagreement, as stated
above, were under the direction of said court heretofore, to
102 wit, on the tenth day of November, 1892, certified, under the seal of the court, to the Supreme Court of the United States; and it appearing, further, from the mandate filed herein on the fifteenth day of June, 1896, that the Supreme Court of the United States refused to answer said questions so certified and adjudged that the said certificate of division of opinion, as aforesaid, be dismissed from said court: Now, therefore, in consideration of the premises, there appearing to be in the record of said cause no error at the trial thereof to the prejudice of the defendants, it is considered that the said motion for a new trial be, and the same is hereby, overruled; and thereupon, on motion of the United States attorney for the southern district of Ohio for sentence, it is considered and adjudged that the

defendants, Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, commissioners of Muskingum county, Ohio, be, and they are hereby, sentenced to pay to the United States of America the sum of ten ($10) dollars each and the costs of this prosecution; to all of which findings and judgment and sentence of the court the said defendants, jointly and severally, except.

And afterwards, to wit, on the 24th day of November, A. D. 1897, an entry was made upon the journal of said court in said cause; which said entry is clothed in the words and figures following, to wit:

*Entry as to Bill of Exceptions.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
*vs.*
FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. RUTLEDGE, County Commissioners of Muskingum County, Ohio, Defendants.

This day this cause came on to be heard on the application of the defendants for the allowance and the signing of the bill of exceptions herein, and the court, having carefully examined the same, finds it to be correct, and it is hereby allowed, signed, sealed, and ordered to be made a part of the record herein this twenty-
103 fourth day of November, A. D. 1897.

And afterwards, to wit, on the 24th day of November, A. D. 1897, came the defendants, by their solicitors, and filed in the clerk's office of said court their certain petition for writ of error and assignment of errors; which said petition and assignment are clothed in the words and figures following, to wit:

*Petition for Writ of Error; Assignment of Errors.*

United States District Court, Southern District of Ohio, Eastern Division.

FRANK M. RIDER, JOHN F. BURGESS, and Samuel M. Rutledge, County Commissioners of Muskingum County, in the State of Ohio, Plaintiffs in Error,
*vs.*
THE UNITED STATES, Defendant in Error.
At Law. Petition for Writ of Error.

And now comes Frank M. Rider, John F. Burgess, Samuel M. Rutledge, county commissioners of Muskingum county, in the State of Ohio, plaintiffs in error, and say that on or about the first day of June, 1897, this court entered judgment herein in favor of the defendants in error and against these plaintiffs in error, in which

judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of these plaintiffs in error, all of which will more in detail appear from the assignment of errors which is filed with this petition. Wherefore these plaintiffs in error pray that writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

SIMEON M. WINN &
FRANK H. SOUTHARD,
*Att'ys for Plaintiffs in Error.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

104 FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. Rutledge, County Commissioners of Muskingum County, Ohio, Plaintiffs in Error, vs. THE UNITED STATES OF AMERICA, Defendant in Error. } At Law.

*Assignment of Errors.*

The plaintiffs in error in this action and in connection with their petition for a writ of error make the following assignments of error, which they aver occurred upon the trial of the cause, to wit: 1st. The court erred in overruling the demurrer filed by plaintiffs in error to the information of defendant in error. 2nd. The court erred in its charge to the jury, as appears of record. 3rd. The court erred in holding that Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by the sections 4 and 5 of the act of September 19th, 1890, to determine when a bridge is an unreasonable obstruction to the free navigation of the river. 4th. The court erred in holding that a failure to comply by persons owning and controlling any such bridge with said determination of the Secretary of War can lawfully subject them to a prosecution for misdemeanor. 5th. The court erred in overruling the motion of plaintiffs in error for a new trial. 6th. The court erred in entering judgment in favor of the defendant in error and against the plaintiffs in error.

S. M. WINN &
F. H. SOUTHARD,
*Att'ys for Plaintiffs in Error.*

And afterwards, to wit, on the 24th day of November, A. D. 1897, an entry was made upon the journal of said court in said cause; which said entry is clothed in the words and figures following, to wit:

*Entry.*

The Circuit Court of the United States, Southern District of Ohio, Eastern Division.

FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. RUTLEDGE, County Commissioners of Muskingum County, in the State of Ohio, Plaintiffs in Error,

*vs.*

105 THE UNITED STATES, Defendant in Error.

This 24th day of November, 1897, came the plaintiff in error, by their attorneys, and filed herein and presented to the court their petition praying for the allowance of a writ of error intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof the court does allow the writ of error upon the plaintiffs in error giving bond according to law in the sum of $250.00, which shall operate as a supersedeas bond; which said bond is duly presented & approved.

And afterwards, to wit, on the 24th day of November, A. D. 1897, came the plaintiffs in error, by their attorneys, and filed in the clerk's office of said court their certain error bond in this cause; which said error bond is clothed in the words and figures following, to wit:

*Error Bond.*

The Circuit Court of the United States, Southern District of Ohio, Eastern Division.

FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. RUTLEDGE, County Commissioners of Muskingum County, in the State of Ohio, Plaintiffs in Error,

*vs.*

THE UNITED STATES, Defendant in Error.

Bond on writ of error.

Know all men by these presents that we, Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, as principals, and Finley M. Fleming, H. L. Greiner, and F. B. Fell, as sureties, are held and firmly bound unto the United States of America in the full and just sum of $250, to paid to the said the United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

106 Whereas lately, at the circuit court of the United States for the southern district of Ohio, eastern division, in a suit pending in said court between The United States, as plaintiff, and the said Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, commissioners of Muskingum county, in the State of Ohio, defendants, a judgment was rendered against the said Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, and the said Frank M. Rider, John F. Burgess, and Samuel M. Rutledge having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the United States of America, citing and admonishing the United States of America to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the — day of —— next:

Now, the condition of the obligation is such that if the said Frank M. Rider, John F. Burgess, and Samuel M. Rutledge shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make the said plea good, then the above obligation to be void, and *as well* to be and remain in full force and virtue.

Sealed and delivered in the presence of—

| | |
|---|---|
| [SEAL.] | F. M. RIDER. |
| [SEAL.] | JOHN F. BURGESS. |
| [SEAL.] | SAMUEL M. RUTLEDGE. |
| [SEAL.] | FINLEY M. FLEMING. |
| [SEAL.] | H. L. GREINER. |
| [SEAL.] | F. B. FELL. |

Approved by—

GEO. R. SAGE,
*District Judge.*

107 THE UNITED STATES OF AMERICA, }
*Southern District of Ohio, Eastern Division,* } ss:

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause as the same appears of record and on file in said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Columbus, Ohio, this 29th day of November, A. D. 1897.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk*,
By C. P. WHITE, *Deputy.*

108 THE UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The United States and Frank M. Rider *et al.*, commissioners of Muskingum Co., Ohio, a manifest error hath happened, to the great damage of the said Frank M. Rider *et al.*, commissioners aforesaid, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24th day of November, 1897, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal United States District Court, Southern Dist. Ohio.]

B. R. COWEN,
*Clerk of the Circuit Court of the U. S., S. D. O.*

Allowed by—
HON. GEORGE R. SAGE,
*U. S. District Judge.*

109 [Endorsed:] United States circuit court, southern district of Ohio. No. 211. The United States *vs.* Frank M. Rider *et al.* Writ of error. Filed —— —, 18—. —— ——, clerk.

110 THE UNITED STATES OF AMERICA, *ss*:

To Harlan Cleveland, district attorney for the United States for the southern district of Ohio, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, commissioners of Muskingum county, Ohio, are plaintiffs and The United States is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 25th day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

GEO. R. SAGE,
*U. S. District Judge, S. D. O.*

111 [Endorsed:] Marshal's civil docket No. 464. United States circuit court. No. 211. The United States *vs.* Frank M. Rider *et al.*, com'rs of Muskingum Co., O. Citation to defendant in error. Filed —— —, 18—. —— ——, clerk.

UNITED STATES OF AMERICA, }
*Southern District of Ohio,* } *ss*:

Received this writ at Cincinnati, Ohio, on the 26th day of November, 1897, and on the 29th of November, 1897, I executed same by handing personally a true copy hereof, with all the endorsements thereon, to the within-named Harlan Cleveland, district attorney for the United States for the southern district of Ohio, at Cincinnati.

MICHAEL DEVANNEY,
*U. S. Marshal, S. D. O.,*
By M. H. SPILLON, *Deputy.*

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Endorsed on cover: Case No. 16,745. S. Ohio C. C. U. S. Term No., 209. Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, commissioners of Muskingum county, Ohio, plaintiffs in error, *vs.* The United States. Filed December 10, 1897.

No. 209.
JAN 3 1899
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United State

Brief of Winn & Southard for C. 5, 6.

Frank M. Rider, John F. Burgess and Samuel M. Rutledg
as County Commissioners of Muskingum Coun
Ohio,

*Plaintiffs in Erro*

Filed Jan. 3, 1899.

*versus*

The United States of America,

*Defendant in Erro*

# BRIEF FOR PLAINTIFFS IN ERROR.

SIMEON M. WINN and
FRANK H. SOUTHARD,
*Solicitors for Plaintiffs in Er*

ZANESVILLE:
GEORGE LILIENTHAL, PRINTER.
1898.

# SUPREME COURT OF THE UNITED STATES.

FRANK M. RIDER, JOHN F. BURGESS and SAMUEL M. RUTLEDGE, County Commissioners of Muskingum County, Ohio,
*Plaintiffs in Error,*

*vs.*

THE UNITED STATES OF AMERICA,
*Defendant in Error.*

**At Law October Term, 1898.**

## Statement.

This cause comes into this Court upon the allowance of a writ of error from the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

The plaintiffs in error were prosecuted and convicted in the Court below under a criminal information based upon the fourth and fifth sections of the River and Harbor Act approved September 19, 1890. Said sections four and five of the River and Harbor Act are clothed in the words and figures following to-wit:

> "Sec. 4. That section nine of the River and Harbor Act of August 11, 1888, be amended and re-enacted so as to read as follows: That whenever the Secretary of War shall have

good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening of the draw span of such bridge by rafts, steam boats or other water crafts, it shall be the duty of said secretary, first giving the parties reasonable opportunities to be heard, to give notice to the persons or corporations owning or controlling such bridge so as to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes to be made and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the District in which such bridge is situated to the end that the criminal proceedings mentioned in the succeeding section may be taken."

"Sec. 5. That section ten of the River and Harbor Act of August 11, 1888, be amended and re-enacted so as to read as follows: That if the persons, corporations or associations owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required, from the Secretary of War and within the time prescribed by him, willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5000.00 and every month such

person, corporation or association shall remain in default in respect to the removal or alteration of such bridge, shall be deemed a new offense and subject the person, corporation or association so offending to the penalties above described."

"Said criminal information so founded upon said sections four and five (omitting formal parts thereof) is clothed in the words and figures following, to wit: "Upon the 15th day of October, 1891, the defendants, Frank M. Rider, John F. Burgess and Samuel F. Rutledge, were then and there the county commissioners in Muskingum County, in the State of Ohio, and then and there the persons empowered by the law of Ohio to construct. alter and keep in repair all necessary bridges over streams and public canals on all state and county roads, and then and there the persons as county commissioners controlling the bridge across the Muskingum river between Taylorsville and Duncans Falls, Muskingum County, Ohio, and the Secretary of War of the United States, having good reason to believe that said bridge was then and there an unreasonable obstruction to the navigation of said Muskingum river. one of the navigable streams over which the United States has jurisdiction, on the 19th day of December, 1890, gave notice in writing to the said defendants, commissioners, as aforesaid, setting forth in substance that said bridge was considered an obstruction to navigation by reason of the fact that it had no draw for the passage of boats desiring to navigate the Muskingum river by way of the new lock just above the south end of the new bridge at Taylorsville, Ohio; and in order to afford said commissioners a reasonable opportunity to be heard and give evidence in regard to said complaint, Tuesday, the 6th day of January, 1891, was set and named as the day when such evidence would

be heard before Lieut. Col. William E. Merrill, Corps Engineer, at U. S. Engineer's Office in Zanesville, Ohio, and which said day of hearing at the request of defendants was extended to the 3rd day February, 1891, and afterwards, to-wit: on the 25th day of February, 1891, and after said day of hearing the Secretary of War gave notice in writing to said defendants controlling said bridge, as aforesaid that the said bridge was and is an unreasonable obstruction to the free navigation of said river, one of the navigable waters of the United States, on account of not being provided with a draw span below the new United States lock No. 9, in said river, and requiring the following change to be made, to-wit: the construction of a draw span in said bridge below the said lock, in accordance with the plans shown on a map attached to said notice and served upon said defendants, and prescribing that said alteration shall be made and completed within a reasonable time, to-wit, on or before the 30th day of September, 1891, and that service of said notice as aforesaid, was made on the 3rd day of March, 1891, by delivering personally a copy thereof to said commissioners at their office in Zanesville, Ohio.

"And the said Frank M. Rider, John F. Burgess and Samuel M. Rutledge, County Commissioners of Muskingum County, Ohio, as aforesaid, did unlawfully, on, to-wit, the 15th day of October. 1891, at the place aforesaid and after receiving notice to that effect as hereinbefore required from the Secretary of War and within the time prescribed by him, willfully failed and refused to comply with the said order of the Secretary of War and to make the alterations set forth in said notice, contrary to the form of sections four and five of an Act of Congress approved September 18, 1890."

Said cause was tried to a jury upon the evidence on December 11, 1891, and a pro forma verdict of guilty was taken. by consent, with the understanding that the questions of law involved should be presented and considered on motion for new trial. Thereupon, and on the 10th day of November, 1892, this cause was brought into this Court on a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of Ohio, and at the October term, 1895, the cause was heard before this Court on the transcript of record, and this Court refusing to answer the questions so certified, the certificate was by order of this Court, dismissed and the mandate of this Court certified back to the Circuit Court. Record pages 55 and 56.

And thereafter and on the 1st day of June, 1897, the motion for a new trial was heard and overruled by the Circuit Court, and the plaintiffs in error were sentenced to pay $10.00 each and costs of prosecution, to which finding, judgment and sentence the plaintiffs in error jointly and severally excepted, and filed their bill of exceptions, which was duly allowed, signed and sealed and made part of the record herein. Record pages 56 and 57.

Thereafter plaintiffs in error filed their petition for writ of error and assignment of errors, praying that a writ of error issue for the correction of errors complained of. Record pages 57 and 58.

On behalf of plaintiffs in error two questions only are urged for the consideration of the Court.

1st. Did the Secretary of War give to the plaintiffs in error reasonable notice and prescribe a reasonable time as provided in said section four of the River and Harbor Act?

2nd. Are the powers attempted to be delegated to the Secretary of War by sections four and five of the Act of Congress referred to exclusively lodged by the constitution in Congress; or can Congress confer those powers upon another by delegation; in other words, can Congress delegate to the Secretary of War the power to determine whether a bridge lawfully constructed over one of the navigable waterways of the United States is an obstruction to the free navigation of such waters, and such an obstruction to navigation that public interests require it to be removed or remodelled; or do these questions belong to Congress to determine, and which cannot be lawfully delegated to any subordinate authority or person?

The fifth and sixth assignments of error asserted and intended to be urged are embraced within said first question. The first, second, third and fourth assignments of error asserted and intended to be urged are embraced within said second question.

Preliminary to the consideration of these questions we submit the following brief statement of uncontested facts which appear on record, viz: The Muskingum river is situated wholly within the State of Ohio. The river is not navigable in its natural state except at times of high water, but was made so by the State of Ohio as early as 1840 by means of a system of dams, locks and side cut canals. At the point on said river where the offending bridge is situated the Muskingum river descends into rapids. At the head of these rapids under legislative grant from the State of Ohio a dam was constructed about the year 1838 across the main channel of said river entirely obstructing navigation thereon, and by like authority locks were built and a side

cut canal was constructed southward to the river below said rapids.

Since 1838 said dam and canal have been under the control of the State of Ohio through its Board of Public Works and through and by means of which canal, together with other dams and canals, slack water navigation was maintained on said river up until the cession of said river and its improvements by the State of Ohio to the Federal Government, March 21, 1887. As early as 1874 the Board of Commissioners of Muskingum County, under and by virtue of a grant from the State of Ohio, by legislative act passed March 25th, 1870, located and constructed in accordance with said act, the bridge herein complained of across the river immediately below said dam, thereby connecting the town of Duncans Falls with the town of Taylorsville which lie upon opposite sides of said river.

The navigation of said river while under the control of the State of Ohio through its Board of Public Works was carried on at said point through said side cut canal, and said canal was kept open and free from obstruction, public travel over said bridge being acommodated by a draw bridge over said side cut canal authorized and constructed by the commissioners of said county by authority of the said Board of Public Works under an act of the legislature of said state and in accordance with plans and specifications approved by said board, said commissioners providing a tender for said draw bridge to open and close said draw to admit the passage of all boats navigating said river, which condition continuously obtained prior to the cession of said river and its improvements to the National Government and continued down to the institution

of criminal proceedings herein. After the cession of said river and its improvements by the State of Ohio to the General Government and during the years 1890 and 1891, with a view of abandoning said side cut canal as a means of navigation on said river, the U. S. Government caused to be constructed in said dam at the head of said rapids what is known as Lock No. 9 where none theretofore existed and constructed from said locks down said river under said bridge and through said rapids, an artificial canal outside of the main channel of said river, and raised the locks and dam on the river below thus raising the water on the level above and sought to provide a new means for navigation at that point.

The Muskingum river with its improvements, was ceded by the State of Ohio to the government of the United States on the 2nd day of May, 1885, and such cession was accepted by the government by act of Congress approved on the 5th day of August, 1886, and the State of Ohio by act of March 21, 1887, made an appropriation for the purpose of completing the transfer of the Muskingum river improvements and properties to the United States, and afterwards, and before the criminal proceedings herein were begun, consumated the transfer of such river and its improvements from the State of Ohio by deed of conveyance to the United States.

With such conditions obtaining, the Secretary of War, on the 25th day of February, 1891, served upon the plaintiffs in error a notice clothed in the words and figures following:

WAR DEPARTMENT.
WASHINGTON CITY, Feb. 25, 1891.

"To the County Commissioners of Muskingum

County, Ohio:

"Take notice that;

Whereas, the Secretary of War has good reason to believe that the bridge owned and controlled by Muskingum County, Ohio, across the Muskingum river between Taylorsville and Duncans Falls is an unreasonable obstruction to the free navigation of said river (which is one of the navigable waters of the United States), on account of not being provided with a draw span below the new United States lock No. 9 in said river; and

"Whereas, the following alteration will render navigation through it reasonably, free, easy and unobstructed, to wit, the construction of a draw span in said bridge below the said lock in accordance with the span shown on the map hereto attached and,

"Whereas, to the 30th day of September, 1891, is a reasonable time in which to alter the said bridge as described above:"

"Now, therefore, in obedience to and by virtue of the fourth and fifth sections of an act of the congress of the United States entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved September 19th, 1890. Redfield Proctor, Secretary of war, does hereby notify said County Commissioners of Muskingum County, Ohio, to alter the said bridge as described above, and prescribe that said alteration shall be made and completed on or before the 30th day of September, 1891.

L. A. GRANT,
Assistant Secretary of War."

(Record, page 50.)

Coming now to the consideration of the first proposition and while considering same, (assuming that the Secretary of War might lawfully possess and exercise the power to require the owners of a bridge over a navigable waterway to remove, change or alter the construction thereof as provided in said sections four and five under consideration,) did the Secretary of War give to the plaintiffs in error reasonable notice and prescribe a reasonable time in which to complete the work required to be done?

It clearly appears from the language of Section five that what is to be deemed reasonable notice or time within which to make the changes required is, and of necessity must be, governed and controlled by the facts and circumstances of each particular case in which the power of the government is invoked.

Section four of the act provides in terms that the Secretary of War shall prescribe in *each case* a reasonable time. The notice in this case was directed to the official board of the County Commissioners of Muskingum County, Ohio, having in charge and under control the construction, alteration and repair of all necessary bridges over streams on all state and county roads, within their county, including the bridge in question, and whatever was required by the notice was a duty imposed upon the official board and not upon the individual members constituting the board. The powers of this official board were all pointed out and prescribed by the statutes of the state and the board could not lawfully raise any money or appropriate the same when raised for the construction, alteration or repair of the bridge in question, except in the manner auth-

orized by the laws of the state. A time sufficient, therefore, must have been given in the notice to enable the Board of Commissioners to carry out its mandates, and in order to raise the money necessary to make the changes required by the notice under consideration regard must have been had by the Board of Commissioners to the laws of the state under and by virtue of which alone they were authorized and empowered to act. The Secretary of War was bound to take notice of the powers of the Board of County Commissioners and the laws governing and controlling its official acts when he served the notice, and so knowing, was bound to prescribe therein a reasonable time for their compliance with the demands thereof. But whether the Secretary of War actually knew or whether he was bound to know these things would not change the rule as to the requirement of reasonable notice under the facts that surrounded the Board of Commissioners at the time of the service of the notice. The notice was served by the Secretary of War on February 25th, 1891, and the limitation expired on September 30th, of the same year. (Record page 50.)

When this notice was served upon the Board of Commissioners there were no funds in the county treasury available for the purpose indicated, and no funds could be raised by the board through levy or taxation within the limitation prescribed in the notice and no general or special legislation could be had that would have empowered the board to meet the demands of the secretary as the record shows; in other words, the Secretary of War prescribed a time within which the Board of Commissioners, however desirous could not have performed the

requirements of the demand, because they were without public funds, and within the period prescribed could not have raised them in any manner known to the laws of their state. A notice that requires the performance of impossible acts cannot, we submit, be held to be reasonable notice or of any binding force or effect.

Under section five of the act it will be seen that it is the "*wilful failure* or *refusal*" of the person to remove the obstruction. Regard must be had to the character of the statute to be enforced. The sections of the act under consideration are penal in their nature and before a citizen can be punished for a failure to perform their requirements it must be made to appear that he had the opportunity and ability to perform them. No citizen can be put in default and criminally punished for a failure to do the *impossible*. As hereinbefore stated it appears from the evidence that when the notice was served by the Secretary of War upon the Board of Commissioners there were no funds in the county treasury with which to make the required change.

(Testimony of John F. Burgess, one of the plaintiffs in error, record, page 30.)

> Q. Can you state when the notice was served upon your board by the government to remove the obstruction claimed to be caused by the bridge at Taylorsvills?
>
> A. I cannot just give the date. It was sometime in March.
>
> Q. You were a member of the board at that time?
>
> A. Yes sir.
>
> Q. You may state whether there were any funds in the treasury of the county available for the making of the improvement or changes required by the government?

A. At that time there was no fund could be applied; no sir.

Q. Were there no funds that could have been made available except by legislation?

A. I think not.

Q. Have you any doubt?

A. No, there was none.

Is also appears from the record that the Board of Commissioners could only make levies for bridge purposes at their March and June sessions in each year, one-half of the amount so levied would not be collectible before December 20th of the same year and the remaining portion not before the 20th of June of the year following.

See Sec. 2824 Revised Statutes of Ohio, which provides as follows:

> "The Commissioners at their March or June session annually may levy on each dollar of valuation of taxable property within their county for road and bridge purposes."******

The taxes so levied by the Commissioners for road and bridge purposes are collectible in December following such levy, or, one-half in December and the balance in June of the following year. See Sec. 1091 Revised Statutes of Ohio, as follows:

> "Each person charged with taxes on a tax duplicate in the hands of a County Treasurer may pay the full amount of such taxes on or before the 20th day of December, or one-half thereof on or before the 20th day of December, and the remaining half thereof on or before the 20th day of June next ensuing."****

It also appears from the evidence that the cost of the changes required to be made by the notice exceeded $10,000 and that the Board of Commission-

ers could only meet that requirement and raise the required funds by the aid of a special act of the state legislature, and that the Board of Commissioners sought to secure such legislation but failed in their effort.

(Testimony of John F. Burgess, record, pages 30 and 31.)

Q. Are you able to state approximately the cost of this change required by the government in this bridge?

A. The probable cost, I should think, would be in the neighborhood of $30,000.

Q. What was the earliest date under any levy that your Board could make—what was the earliest date in which funds could be realized for bridge purposes—say at the date of the services of the notice in March?

A. There could not have been any made for that purpose without a special act of the legislature.

Q. Upon this point did you take any steps at any time to raise money for this purpose?

A. I think it was done.

Q. Well?

A. Our members of the legislature were talked to in that matter.

Q. Did you get any authority?

A, It was too late, too near the end of the session, and nothing could be done.

Q. When was that?

A. The last of March.

Q. And that was the only move?

A. Yes sir.

Q. Had your Board control of a fund for the building of bridges?

A. Not that kind of a bridge.

Q. You have a bridge fund?

A. Yes sir; we have a bridge fund.

Q. A general bridge fund?

A. Yes sir; but we hadn't any at that time.

(Also testimony of Lieut. C. E. Gillette, Corps of Engineers. Record, page 33.)

Q. Then in your estimate, Lieut., have you taken into account the expense of cofferdams?

A. No.

Q. In making this estimate you have not had in mind the plan of bridge and superstructure required by the general government of the Board of Commissioners, have you?

A. I have had in view the plans as drawn on the blue print.

Q. You have given your estimate based upon what the government, as you understand it, is requiring of the Board of Commissioners?

A. Yes sir; the government did not require any particular kind of bridge.

Q. You are putting an estimate upon some structure as good as the one already there?

A. Yes sir.

Q. And not upon what a new structure built according to modern engineering would cost?

A. I would say as good as the kind put in at Brush Creek recently; it is a much shorter span.

Q. That you think would be about ten or twelve thousand dollars?

A. Yes sir; a very rough estimate.

(See also Sec. 2825 Revised Statutes of Ohio, as follows:

"The County Commissioners shall not levy any tax or appropriate any money for the purpose of****building any bridge except in case of casualty the expense of which will ex-

> ceed ten thousand dollars without first submitting to the voters of the county the question of the policy****if at any such election a majority shall be found in favor of the improvements as aforesaid, then the Commissioners shall be authorized to proceed to levy the tax."

The exception in case of casualty found in the last named section has reference to the preceding section No. 2824, Revised Statute, which is clothed in the language following:

> "Provided further that in case an important bridge belonging to or maintained by any county has been or shall be destroyed or become dangerous to public travel by decay or otherwise, and the restoration thereof is deemed necessary for public accommodation, the Commissioners may levy a special tax for that purpose."****

It will be seen that the matter under consideration is not a casualty to which the statutes just quoted have reference.

Three matters, therefore, were established and uncontroverted at the trial of the cause in the Court below.

First: That the Board of County Commissioners had no funds available with which to make the changes provided for in the notice.

Second: That they could not have realized any money by levy within the limitations of the notice, because they could not have levied any tax for bridge purposes before March, and none of the taxes so levied in March could have been made available until December 20th of the same year which was after the limitation fixed in the notice.

Third. That they could not secure the funds necessary by special legislation. The failure of the legislature to pass the necessary legislation to enable the Board of Commissioners to raise the required funds could not put the Board in default. The Board of Commissioners could not, therefore, within the period of the notice have complied with its demands. It will not be urged, we apprehend, that this notice cast any obligations upon the plaintiffs in error as individuals. It would be manifestly unreasonable to assume that they were called upon to expend their own private funds in the performance of duties prescribed in the notice or to raise the necessary funds in any other way than the way provided and allowed by the statutes of the State. It is not the meaning or intention of this act to punish them for their refusal to commit malfeasance in office. In view of the position and conditions that surrounded the Board of Commissioners pointed out and clearly established upon the trial of the cause below by the undisputed evidence, the Court should have granted the motion for new trial and set aside the verdict of guilty. What is reasonable notice or reasonable time is always a question exclusively for the Court where the facts are clear. It was so held in Wiggins vs. Burkham, 10 Wallace 132, and Tolan vs. Sprague, 12 Peters 336.

For the reasons urged, we submit that the verdict is against the law and the evidence. and the Court, by refusing to grant the motion and set the verdict aside, committed manifest error to the predjudice of these plaintiffs in error.

We come now to the consideration of the second proposition which we regard the vital question and the one that goes to the root of the matter is," Has Con-

gress the power to confer upon the Secretary of War the authority sought to be conferred by this act?" In accordance with its terms when the Secretary of War has good reason to believe that any bridge spanning any of the navigable waterways of the United States is an unreasonable obstruction to navigation he is to give notice to the parties owning or controlling the same after first giving them an opportunity to be heard, to make such alterations as he shall specify, and if they fail or refuse to comply with his order, within a reasonable time, they are to be deemed guilty of a misdemeanor, and the Secretary of War may direct the institution of criminal proceedings. The power of the Secretary depends upon his first finding, and having adjudged that the bridge is an unreasonable obstruction to navigation and his adjudication is made final, there being no provision for a review of his findings. Is not this judicial power? We answer in the affirmative. The question is certainly one of fact, or a mixed question of law and fact, and cannot be determined by a court without the aid of a jury unless the defendants consent. There seems to be no question but that Congress can authorize the erection of a bridge across any of the navigable waterways of the United States upon such plans as may be adopted by the Secretary of War, as was held in case of Miller vs. Mayer &c (109 U. S. p. 385), but the adoption of plans by the Secretary is not a judicial act, nor does the authority to approve or adopt plans for the erection of a bridge confer on him judicial power. Is the Secretary of War such an officer of the general government, in whom, under the constitution, judicial power can be vested? We think not. It was held in Grant vs. Raymond

6 Pet. 242. Chief Justice Marshall delivered the opinion that the Secretary of State is not an officer in whom under the constitution judicial power can be vested. If the Secretary of State is not such an officer why the Secretary of War? In Grant vs. Raymond, the Secretary of State had gone through the form of reissuing a patent for an invention. It is true at that time there was no statute authorizing a reissue. The same having been signed by the President and countersigned by the Secretary it was returned to the patent office and cancelled owing to defective specification on which the original was issued, and a new patent issued with a corrected specification. The argument there in favor of the reissue was that the Department of State clearly had the right to correct an inadvertent or innocent mistake, but the Court said that the question of inadvertence or mistake, was a judicial question which could not be decided by the Secretary of State. It is also true that since that time Congress enacted laws which made it lawful for the Secretary of State and subsequently conferred authority on the Commissioner of Patents, to reissue patents for similar reasons, but provided that the reissued patent should be liable to the same defenses as the original. But there is a radical difference between the case of a reissued patent and the case now before this Court. The patent original or reissued, is only *prima facie* evidence of an exclusive right in the patentee, and is open to all defenses, including are issued patent, the question whether in the original there was such accident, mistake and inadvertence, as was requisite to the reissue, while here the Secretary of War finds and decides conclusively and finally whether the bridge is an obstruction. What

changes shall be made and within what time; and the only question left open to be heard upon the criminal information for misdemeanor filed at his instance and after he has finally determined all the questions of fact, are whether he had made the findings and decision, ordered the changes, given the proper notices, and whether the defendants have complied with his orders.

Having, as we think, conclusively shown that the power sought to be conferred by Congress is one that is judicial and that the only question which is left to be decided by a jury in the case of a criminal prosecution is whether or not the Secretary of War has declared a bridge to be an unreasonable obstruction. We then come to the question of the charge of the Court which is found on page 34 of the record, which is as follows: "And thereupon the Court charged the jury and among other things charged that Congress had the constitutional power to confer upon the Secretary of War authority to determine when a bridge such as the bridge in question is an unreasonable obstruction to the free navigation of a river and that the failure to comply by persons owning and controlling any such bridge as by the defendants in this case, if they so found, with such a determination by the Secretary of War after due notice and otherwise full compliance with the Act of Congress in that behalf lawfully subjected thereto by prosecution for a misdemeanor as provided by Act of Congress, to all of which parts of said charge defendants at the time then and there excepted."

In this, we think, the trial Court erred and the trial Court having instructed the jury that Congress had the power and constitutional right to confer

upon the Secretary of War the right to determine what was an unreasonable obstruction, nothing was left for the jury to do but to find the defendants guilty.

By the constitution of the United States, Congress has the paramount and conclusive authority in the regulation of the commercial highways of the country, if Congress shall undertake to confer that power upon the Secretary of War in so doing it must abdicate its paramount and conclusive authority and control over commercial highways. If Congress has that power, then Congress may declare a bridge a lawful structure, may declare its height, width of spans and the manner of its construction, and say that it is a legal structure, then the Secretary of War may be of the opinion that such a structure is not what he thinks it should be and in his opinion it is an obstruction to navigation. Who is to speak? Is it Congress, or is it the Secretary of War? It is probable that no bridge constructed across any of the navigable waterways of the United States is not some obstruction to the free navigation thereof. Sec. four of the act under which the Secretary of War claims to act requires the Secretary in case he has good reason to believe that a bridge is an unreasonable obstruction to the free navigation of a river by reason of insufficient height, width of span or otherwise, or where there is difficulty in passing the draw opening or raft span of the bridge, to give notice to the parties owning and controlling the same that they may have a hearing as to whether they shall comply with this order requiring such changes and alterations as in his opinion shall be proper.

This section must be construed literally, and if

so, it would compel the Secretary of War to require the alteration or possible removal of nearly every bridge in the country that spans a navigable river, and the only escape from this conclusion is to hold that it is intended to only require the alteration of bridges that cause an unreasonable obstruction to navigation or create an unreasonable difficulty in passing the draw spans thereof, and that the Secretary of War must determine in each case whether the bridge is or is not an unreasonable obstruction before he can require it to be altered. Therefore, we are forced back to the conclusion that the section in question confers upon the Secretary of War the duty of determining whether the given bridge in an unreasonable obstruction before the serving of any notices which in turn must involve the duty by the Secretary of War of determining how much of an obstruction the public interests require should be placed in the way of free navigation of the river which we maintain is a question which belongs alone to Congress to determine and which cannot be rightfully delegated to any subordinate authority or person. It certainly cannot be claimed that Congress could delegate the power to the Secretary of War to determine where and what bridges should be constructed across the navigable waters of the United States and if Congress cannot confer that authority upon the Secretary of War, how can it confer upon the Secretary of War the power and the right to determine what is an unreasonable obstruction to the navigation thereof. In each case the Secretary of War would be required to determine to what extent the free navigation of a river might be obstructed in the public interest and in one case to require the bridge to be built and in the other to be

remodeled or altered so as not to cause an obstruction greater than that which the Secretary had determined the navigation of the given river should be subject to and thus the judgment and decision of the Secretary upon the question of the amount of obstruction that the public interest demands should be caused to the otherwise free navigation of the river would be substituted to the judgment and decision of Congress upon this question. Hence, to suppose a case it would be in effect if a bridge owned by any person, company or corporation should be constructed in accordance with the requirements of an Act of Congress authorizing its erection, the case is then presented in this form. Congress declared that the navigation of the stream over which it authorized the construction of such a bridge should be subjected to so much of an obstruction as would be caused thereto by the erection of the bridge at the place and in the form provided in the act authorizing the construction of the same and the bridge having thus been built in conformity to the Act of Congress, then if afterwards the Secretary of War should be of the opinion and should deem the bridge to be an obstruction, then it must be remodeled or removed, or to state it otherwise, a bridge which Congress authorized and declared to be a legal structure can be declared to be illegal and therefore removable by the Secretary of War, and in effect a structure which was a legalized obstruction to the navigation of a river is declared to be an obstruction by the Secretary of War and for that reason the bridge must be removed or rebuilt in whole or in part as the Secretary of War might determine. Then it must be held if this is true that the section of the Act of Congress hereinbefore referred to was

not intended to be applied to such cases, or if it was then the section is void for the reason that Congress cannot confer the power upon the Secretary of War of determining questions which Congress alone can decide, nor can the Secretary be empowered to determine when an Act of Congress anthorizing and legalizing the erection and maintenance of a bridge over a navigable river shall cease to have that effect and thus declare a bridge to be an illegal obstruction to navigation which Congress has declared is a legal obstruction. If this be true, then the paramount and conclusive authority as to the regulation of the navigation of the navigable rivers and waterways of the United States is abdicated and the constitution conferring upon Congress that power is of no effect. We do not contend but that Congress may, whenever it sees fit, by any specific act, pass a law authorizing the construction of a bridge and to say how much obstruction to navigation the river over which it is authorized to be constructed shall endure, nor do we contend that Congress may not in its discretion, even though it may have authorized the erection of a bridge across a river afterwards withdraw that authority and say that the bridge may be removed as in this case the bridge having been constructed over the Muskingum river before Congress assumed control or management of the same during the time the river was under the control of the State, having been approved by the Board of Public Works of the State of Ohio, yet Congress may, by specific act declare the bridge in question an unreasonable obstruction to navigation and order such changes or removal as Congress may desire. And it may also by act, as referred to in Wheeling vs.

Bridge Co. hereinbefore mentioned take a bridge that was constructed without authority and declare it legal but Congress cannot confer such authority upon the Secretary of War.

The construction of sections nine and ten of the Act of 1888 as amended by sections four and five of the River and Harbor Act Sept. 13, 1891, have been before the Courts of the United States first in the case of the United States vs. Keokuk and H. Bridge Co. reported in 45th Federal at page 178 and again reported in 50th. Federal Reporter in the case of the United States vs, Rider, et. al., County Commissioners at page 106 which we here cite and claim that each of said cases and the reasoning thereof is applicable to this case and that they are authority to support the proposition as to the power of Congress to confer upon the Secretary of War the right to determine what is an unreasonable obstruction and to sustain us in the claim that Congress under the constitution has no such power, and we refer the Court to the cases above mentioned and to the reasoning of the Courts in deciding it.

Hence, in conclusion we say that the notices served upon the Commissioners of Muskingum county by the Secretary of War were void and of no effect and that the trial and conviction of the plaintiffs in error is also void and of no effect and should be reversed and set aside and that the Court erred in charging the jury that Congress had the power to confer upon the Secretary of War the authority attempted to be conferred by the act hereinbefore mentioned, and for the reasons stated that the judgment of the Court below in passing sentence upon these defendants should be set aside and that

the act referred to should be held to be unconstitutional and that plaintiffs in error should be permitted to go hence without day.

Respectfully Submitted,

S. M. WINN and
F. H. SOUTHARD,
*Solicitors for Plaintiffs in Error.*

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Brief of Atty. Gen. (Gorman & Richards) for D. C

Filed Jan. 26, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

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FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. RUTLEDGE, as County Commissioners of Muskingum County, Ohio, plaintiffs in error.
*v.*
THE UNITED STATES OF AMERICA, defendants in error.
} No. 209.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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# BRIEF ON BEHALF OF THE UNITED STATES.

# In the Supreme Court of the United States.

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### STATEMENT.

This is a writ of error sued out from the circuit court of the United States for the southern district of Ohio, eastern division. The plaintiffs in error were prosecuted and convicted in the court below under a criminal information based upon sections 4 and 5 of the river and

harbor act approved September 19, 1890, which said sections are as follows, to wit:

That section nine of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken."

Section 5:

That section ten of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

"That if the persons, corporation, or association owning or controlling any railroad or other bridge

shall, after receiving notice to that effect as hereinbefore required from the Secretary of War, and within the time prescribed by him, willfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars; and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed."

The cause was tried before a jury on the 11th of December, 1891, resulting in a verdict of guilty, the court reserving for consideration the question of constitutionality of the act until the argument of the motion for a new trial. Upon the argument of the motion for a new trial, the circuit judge (Judge Taft) and the district judge (Judge Sage) differed in opinion, and thereupon said difference of opinion was certified to the Supreme Court of the United States. At the October term, 1895, of this court the said certificate of division of opinion was dismissed, upon the ground that since the passage of the act of March 3, 1891, creating the circuit court of appeals, the Supreme Court had no longer jurisdiction of certificates of division of opinion in criminal causes. (163 U. S., 132.)

In June, 1897, a mandate of the Supreme Court was received and entered in the court below, and judgment rendered for the United States, and a fine imposed upon

the commissioners, the opinion of Judge Taft prevailing, he being the circuit judge.

In connection with the bill of exceptions it is to be observed that they were not signed until November 24, 1897, although the case was tried at the December term, 1891. The verdict was rendered at the December term, 1891, but the judgment was not rendered until the June term, 1897, and the record shows no continuance of the case for allowing or permitting a bill of exceptions to be filed after the trial term. Under such a condition of facts it is difficult to see what authority resided in the trial court to sign and certify a bill of exceptions five years after the return of the verdict, when the record shows no continuance of the cause for that purpose.

The bill of exceptions assigns numerous causes of error, all of which, however, are referable to two general propositions and are made to be embraced within the same by the counsel for the plaintiffs in error. The two general questions to be considered are:

First. Whether the powers granted to the Secretary of War by sections 4 and 5 of the river and harbor act of September 19, 1890, are to be considered as delegations of legislative power to that officer within the meaning of the inhibition expressed in the maxim *delegatus non potest delegare;* and

Second. Did the Secretary of War give to the plaintiffs in error reasonable notice and prescribe a reasonable time for the alteration which he required to be made, within the meaning of the term "reasonable" as used in the said river and harbor act?

Before proceeding to a discussion of these two questions, it is well to remark that although the Muskingum River is wholly within the confines of the State of Ohio, yet the same is under the exclusive management and control of the United States, and was so under the exclusive management and control before and at the time that these proceedings were had in the court below, said river, together with all of the improvements thereon, as constructed by the State of Ohio, having been ceded to the Federal Government by that State on May 2, 1885, and having been accepted by the United States under the river and harbor act of August 5, 1886 (see 24 Stat. L., 324; 25 Stat. L., 405), and since that time the complete control and management of said river has resided in the officers of the Federal Government.

BRIEF.

As preliminary to the discussion of the main question at issue, it is well to bear in mind the four following well-settled propositions:

First. The power of Congress over navigable streams is supreme and grows out of the power to regulate commerce, as conferred upon the Congress by the terms of the Constitution. (*Monongahela Navigation Company* v. *The United States*, 148 U. S., 335; *Bridge Company* v. *The United States*, 105 U. S., 475.)

Second. The Congress has plenary power to enact all laws which it shall deem necessary or proper for carrying into execution any power vested in it by the Constitution, and the degree of necessity which exists for the

passage of such a law can not be inquired into by the courts, but is within the exclusive province of the Congress. If the law passed by it be within the power granted, it is not within the province of the courts to say how reasonable, or how necessary, or how proper it was to pass such a law. (*McCullough* v. *Maryland*, 4 Wheat., 316–421; *The Legal Tender Cases*, 110 U. S., 421, 440, 441.)

Third. When the Congress chooses to act, it is not concluded by anything which has been previously done by its authority from assuming entire control of the matter and of abating any erections that have been previously made, or of forbidding others to be made in the future except they be made in conformity with such regulations as it sees fit to impose. (*State of Pa.* v. *The Wheeling Bridge Company*, 13 How., 518; *Gilman* v. *Philadelphia*, 3d Wall., 713; *Willamette Iron Bridge Company* v. *Hatch*, 125 U. S., 1–12; *Monongahela Navigation Company* v. *The United States*, 148 U. S., 336.)

Fourth. That the Congress has the power to declare what is an obstruction to a navigable stream and to require the same to be removed, altered, or abated, is now too well settled to be questioned. (*Gilman* v. *Philadelphia*, 3 Wall., 713, v. *The Daniel Ball*, 10 Wall., 557, v. *Montello*, 20 Wall., 431; *Bridge Company* v. *The United States*, 105 U. S., 470; *Escanaba Company* v. *Chicago*, 107 U. S., 678; *Miller* v. *The Mayor of New York*, 109 U. S., 385; *Monongahela Navigation Company* v. *The United States*, 148 U. S., 336.)

## I.

THE POWER INTRUSTED BY THE ACT OF SEPTEMBER 19, 1890, TO THE SECRETARY OF WAR IS NOT THE DELEGATION OF A LEGISLATIVE FUNCTION, BUT IS MERELY THE DELEGATION OF A POWER TO DETERMINE A FACT OR STATE OF THINGS UPON WHICH THE LAW MAKES OR INTENDS TO MAKE ITS OWN ACTION DEPEND. IT IS NOT, THEREFORE, OPEN TO THE OBJECTION THAT THE CONGRESS HAS DELEGATED TO ANOTHER A POWER WHICH COULD ONLY BE EXERCISED BY ITSELF, BUT IS MERELY THE SELECTION OF AN AGENCY TO CARRY OUT THE WILL OF THE CONGRESS, THE SELECTION OF SUCH AN AGENCY BEING RENDERED IMPERATIVELY NECESSARY BY THE INTERESTS AND MAGNITUDE OF THE POWERS INTRUSTED TO ITS CARE.

In the case of *United States* v. *Keokuk and H. Bridge Company* (45 Fed. Rep., 178), it was held by Judge Shiras that a bridge having been built and maintained in accordance with the requirements of an act of Congress, the Secretary of War can not declare it an obstruction to navigation and require it to be changed, remodeled, or rebuilt under the act of Congress of August 11, 1888 (25 Stat. L., 424, sections 9 and 10), and the opinion is expressed that the power delegated by that act to the Secretary of War was an improper delegation of legislative authority, and this case was followed and to some extent amplified by Judge Sage in the case of *The United States* v. *Rider* (50 Fed. Rep., 410).

Since these decisions the act of 1888 has been amended by sections 4 and 5 of the act of 1890 previously quoted in this brief. Among other material changes made by the amendments it is provided that the obstruction must be unreasonable, and that the parties shall have a reasonable opportunity to be heard, and that the Secretary of War shall specify the change to be made. Section 5 expressly makes a failure to comply with the requirements of section 4 a misdemeanor.

Since the passage of these amendments the act has been before the district court for the northern district of Illinois for construction in the case of *The United States* v. *The City of Moline* (82 Fed. Rep., 593), in which the contentions which are raised here were made, and in which the decisions in the Rider Case and in the Keokuk Bridge Case, above referred to, were fully considered. It was held, however, that section 4 of this act of September 19, 1890, authorizing the Secretary of War to give notice for the alteration of bridges that he believes to be unreasonable obstructions to navigation, and empowering the district attorney to prosecute parties refusing to comply with such notice, is not unconstitutional, as vesting in the Secretary of War either judicial or legislative power, and in rendering the decision Judge Grosscup said:

> The bridge during the time of its present construction is an effectual obstruction to such waterway. If Congress can, by special act, constitutionally endow the arm of the Secretary of War with the power to remove everything that lies in or across that river obstructive to the proposed waterway,

why may it not grant such power, with equal efficacy, by a general act applying to all cases as they arise? Whether the act conferring the power be special or general, the War Department becomes simply the arm that carries out the legislative will. It is true that this involves decision of the Department, but the Department can in no instance be an effective and at the same time an insensate and unjudging executive instrument. In administrative undertakings of this character the directions can not be so completely foredrawn by Congress that there will be left no questions to the administrative mind to decide. The test of the legality of the delegation of the power is, not that the administrator must himself decide questions as they arise, but, are the questions thus presented essentially judicial?

In this case two questions alone arise: First. Is the bridge an obstruction to navigation? Second. Is it there by any such legal right that the Government may not interfere with it in the respect designated without just compensation? The first question is purely administrative, and is one that Congress can certainly delegate to the Secretary of War. A thousand questions of equal moment to the parties interested, and of equal difficulty, are necessarily delegated to the great departments of the Government every month. In the very nature of things, Congress can not dispose of them. A government of the size of this, operated upon such a conception, would be clogged immediately.

The second question is, undoubtedly, judicial, and for that very reason is not subject, constitutionally, to the decision of Congress any more than of the Secretary of War. If the bridge be there by legal right—if it be a franchise or property that can not be taken except after just compensation—Congress

is powerless, either by special or general acts, to touch it. In the face of such property right, Congress is as helpless as the War Department. In the end, such right, whether it be attacked by special act of Congress, or by some action of the War Department, will, through some channel, find an appeal to the judiciary.

This right of appeal to the judiciary in all questions in their nature judicial is preserved in the sections of the statute under discussion. The Secretary of War has no power to carry out his decisions respecting these obstructions except through a court. Any question, whether of law or fact, essentially judicial, may be raised under these informations. A court of the United States stands always, by the clear provisions of the act, between the decision of the Secretary and its execution. There is, therefore, in the act no delegation of judicial power to the Secretary that is not open to review in the courts. I hold, therefore, that the act, so far as it is applicable to the case in hand, is constitutional and valid, and the motion to quash will be overruled.

The provisions of sections 4 and 5 of this act of September 19, 1890, were also before this court in the case of *Lake Shore and Michigan Southern Railway Company* v. *Ohio* (165 U. S., 365), and while the question of the delegation of legislative power to the Secretary of War was not passed upon in that case, yet the act was upheld by the court, the court holding that this act, which confers upon the Secretary of War authority concerning bridges over navigable waterways, does not deprive the States of authority to bridge such streams, but simply creates an additional cumulative remedy to prevent such structures, although lawfully authorized, from interfering

with commerce, and the inevitable inference to be drawn from the decision is that the authority given by said act to the Secretary of War to require the change or removal of such bridge, when in his opinion the same is an obstruction to commerce, is an authority which may be constitutionally delegated by the Congress to the Secretary of War.

A decision similar to the Moline Case was rendered in the case of *The United States* v. *Ormsby* (74 Fed. Rep., 207), under the act of August 17, 1894, whereby the Congress empowered the Secretary of War to prescribe such rules and regulations for the use, administration, and navigation of canals, etc., under the control of or operated by the United States as in his judgment public necessity might require; and it was held that such an authorization was not invalid as a delegation of legislative power, and that the rules made by the Secretary pursuant to said law had the force and effect of law, so that persons violating the same by drawing off water from the canal are subject to criminal punishment under the provisions of said act. In that case Judge Seaman, while, of course, admitting the general rule that delegated power can not be redelegated, says:

> This rule, however, applies only to powers which are strictly and exclusively legislative, and there is a wide range of subjects which may be regulated by direct legislation, but for which general provision may be made and power given to those who are to act under such general provisions to fill up the details, for, as remarked by Chief Justice Marshall, "Congress may certainly delegate to others powers

which the Legislature may rightfully exercise itself." (*Wayman* v. *Southard*, 10 Wheat., 1–43.)

* * * * *

The legislature can not delegate its power to make the law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.

As an example of this see the case of *The Aurora* v. *The United States* (7 Cranch, 382). This case grew out of the violation of the nonintercourse act passed by the Congress during the period preceding the war of 1812. This was a law which was to be enforced against Great Britain and France until those countries should modify their policy toward the United States, when the President was authorized to raise the embargo by executive proclamation. Here, of course, was a law which depended entirely for its repeal upon the happening of a contingency, the sole determination of which was left to the Executive.

The right of the Congress, however, to pass such a law was upheld by this court, because the delegation of authority was not a delegation of authority to make the law, but only to enforce it or to repeal it upon the happening of a contingent event, which, in the very nature of things, could not be determined by the Congress. This case which was decided in 1813, and reaffirmed by this court in 1891, in *Field* v. *Clark* (143 U. S., at p. 683), may almost be said to have initiated the doctrine in this country that the legislature may pass a law to take effect upon the happening of a future contingency, and may leave the determination of the happening of that

contingency to an agent selected for that purpose, whether such agent be an executive officer or a municipal corporation, or the people themselves. It has been quoted and followed in hundreds of State decisions, and the principle involved in it invoked to sustain those laws where municipal corporations are authorized to purchase bonds, erect improvements and the like, laws referring the question of the sale of ardent spirits to the people of a county, municipality, or district, and other laws of kindred character.

Though these laws were originally attacked as unconstitutional delegations of legislative functions, and though they have by some courts been for this reason declared unconstitutional, yet the overwhelming weight of authority is in favor of their constitutionality, and the tendency of all the modern decisions, even in those States where they were once denounced, is to sustain them. (See Oberholtzer on The Referendum in America, c. 5, where the decisions of the State courts on this subject are given in chronological order.)

The doctrine which inhibits the redelegation of a delegated power is a limitation placed upon the principle that whomsoever does a thing through another shall be considered as having done the thing himself. It has to do, primarily, with the law of individual agency, and the maxim is sometimes expressed *vicarius non habet vicarium*. (Broome's Leg. Max., 839.)

The doctrine, however, so far as it be applied to the exercise of legislative functions strictly by the legislative body, is true only in a qualified sense and is not to be taken in the strict application that is given to it when

applied to the law of agency as affecting individuals; and the qualifications of this doctrine as applied to the exercise of governmental functions are becoming larger and larger every day and must of necessity become larger as the demands of civilization increase. There is noticeable in all of the modern decisions a tendency in the direction of assigning duties hitherto deemed legislative to other bodies—to boards and commissions, to local authorities, to executive officers, to agents, and particularly to the votes of the people themselves.

The plan of delegating powers which, in the strict sense of the term, may be regarded as legislative, to the people themselves, is growing in favor in every representative form of government, and is the gradual adoption of the system known as referendum; and although the adoption of this name is of recent origin, its principle is as old as the United States themselves, experiments in it having been made in Rhode Island during colonial times. (See Oberholtzer, the Referendum in America (1893, c. 5), where the treatment awarded this class of legislation by the courts is traced in historical order; see Providence Book of Notes, May 5, 1894.) This tendency has manifested itself in a variety of forms. For example, in referring matters of local interest and administration to the electors of the locality interested; in enlarging the scope of State constitutions by adding multitudinous administrative provisions, all of them being submitted to voters; in the submission of questions concerning local option to the vote of the localities interested, and in many familiar statutes of this character.

So examples may be drawn from the provisions of general laws providing for the organization of corporations, conferring upon them powers of eminent domain which operate only when an association of individuals apply for charters under them, thus giving to those voluntary associations the power of saying when and where the great prerogative of eminent domain shall be directed against the property of citizens; the right to refer the adoption or rejection of the terms and conditions of a charter or a question whether a county or township shall be divided or a new one formed, or the question whether a general school law shall be accepted in a particular locality, or whether subscriptions to works of internal improvement shall be made to the decision of the people affected by it; the conditions prescribed by general laws for the organization of municipal corporations, with power to tax and to grant exclusive franchises, which lie dormant until invoked and effectively directed upon particular localities by the voluntary action of a specific number of voters or property holders; provisions of similar character to this last named which are made for the purpose of adding new territory to municipal corporations, etc.

All laws of this character have been contested from time to time upon the ground that they were a delegation of legislative authority, and in the strict and technical use of that term, perhaps they are, but in the practical administration of the affairs of a great government, it has been found to be a physical impossibility to apply a narrow construction of the maxim *delegatus non*

*potest delegare*, and a departure from the strict construction of that maxim, which has obtained in the administration of private affairs, is rendered absolutely necessary by the conditions and the necessities which concern the legislature in the passage of laws for the government and well being of society.

Certain things have been held to be consistent with the rule that power can not be delegated, which perhaps in their ultimate analysis may be found to be in fact a delegation of authority rendered necessary in the practical administration of affairs. It is immaterial what nomenclature be used, whether the result brought about would be a modification of the maxim that power lodged in one department of the Government can not be delegated, or whether it be a refinement upon the facts as to whether or not there has been a real delegation, the practical solution of the problem is the same, and it has always been reached by a wise judiciary, whether the one reason be assigned or the other.

In the question as presented to the court in this case, we have a law whereby the Congress has passed a complete act providing that it shall be a misdemeanor to maintain an unreasonable obstruction to navigation after a notice and hearing and after the special tribunal charged with the investigation and finding of the fact has determined that there is an unreasonable obstruction and a reasonable time for removing the obstruction has expired. The party concerned has a hearing, and the offense is not complete until after the hearing and a determination against him and the opportunity to abate the obstruction has been given.

Now, the whole inquiry resolves itself into this: Must the Congress itself consider every case of alleged obstruction to navigation and determine the facts and declare that an obstruction exists, or can it generally define the offense and leave the facts to be determined by a court or a special tribunal? Because the Congress is vested with the power to protect navigation, and can, therefore, remove an obstruction, it does not follow that it must examine into the details and facts of each case.

It would be impracticable, it would be impossible, and to hold that the Congress itself must determine all of the facts in every given case and perform the functions which, under the act of September 19, 1890, it has authorized the Secretary of War to do will practically result in a complete nullification of the power of the Congress to do anything at all. For example, the present Congress will adjourn on the 4th of March and will not reassemble until the following December. Suppose that on the 5th of March there is built across the Mississippi River a bridge which completely obstructs the navigation of that stream. Is the commerce of all the middle West to remain suspended from March until December because, forsooth, during that time there is no Congress in session to abate the obstruction? Practically, therefore, the argument reduces itself to an absurdity if we are to have any regard for the practical administration of the affairs of a great Government like this.

And so there can be no objection to the Congress permitting the Secretary of War to pass upon the

question of the reasonableness of such an obstruction. What is or is not reasonable must of necessity be a question of fact, wholly dependent upon the peculiar circumstances of each particular case. It can not possibly be measured by a tape line, and it would be as silly for the Congress to pass a law undertaking to define the term "reasonable" as it would be to pass a law for the definition of the word "fraud," and to fix its limitations and its characteristics. If this power is to be exercised at all, it must be under a general law, declaring, as the law under discussion does, that the maintenance of an unreasonable obstruction shall be a misdemeanor and the determination of the facts must be left to some tribunal, either a regular court or else a commission, or else an executive officer.

The determination of such a question in the regular courts by judicial proceedings would be tedious and expensive, and the results would be varied, inasmuch as different juries would arrive at different conclusions upon almost the same state of facts. In the interest of economy, promptness, and uniformity of decision, it is manifest that the best course to be adopted is the one that has been prescribed in the act of 1890. But if it may be regarded as more advantageous to secure the determination of a court upon these issues, then we submit that this result is also accomplished by the act of 1890, inasmuch as there can be no conviction for the offense here denounced except after a trial thereof upon regular information before the United States courts, so that ultimately every possible question arising under this act

may be thus presented to the regular judicial officers of the Government for determination.

The act, therefore, in question can not be made subject to this criticism. But even if it should be considered that the action of the Secretary of War was final, still it is entirely competent for the legislature to establish, independent of the courts, special tribunals, whose judgment shall be final. The taxing interests of this country involve by far the largest question so far as value is concerned. The assessment of property is necessarily intrusted to special tribunals, which operate constantly upon a vast scale; they are composed of non-judicial officers, and if they pursue the law, their conclusions are final; and so it is held that the Congress may intrust to executive officers the final determination of facts upon which foreigners may be sent out or excluded from this country, and their conclusions can not be reexamined by the courts. (*Nishimura Ekiu* v. *The United States*, 142 U. S., 651; *Fong Yue Ting* v. *The United States*, 149 U. S., 698; *Lem Moon Sing*, 158 U. S., 538.)

Congress has repeatedly passed laws committing the execution of acts in regard to the admission of aliens into the United States to the Secretary of the Treasury, collectors of customs, and to inspectors acting under their authority. (See acts of Mar. 3, 1875, c. 141, 18 Stat., 477; Aug. 3, 1882, c. 376, 22 Stat., 214; Feb. 23, 1887, c. 220, 24 Stat., 414; Oct. 19, 1888, c. 1210, 25 Stat., 566.)

By section 3 (22 Stat., 214), and in similar laws, the Secretary of the Treasury was authorized to establish rules and regulations and to issue instructions to carry

out these and other immigration laws of the United States.

In *Enterprise Saving Association* v. *Zumstein* (67 F. R., 1000) it was held by the circuit court of appeals of the sixth circuit, in an opinion delivered by Judge Lurton and concurred in by Judges Taft and Severans, that in enforcing the postal laws against lotteries it was competent for Congress to intrust to the head of the Post-Office Department the determination of the question as to what was a lottery.

Congress can only legislate in a general way, and large powers are necessarily intrusted to the different departments, such, for instance, as the supervising power given to the Secretary of the Interior over questions of patents and in relation to Indians and the public lands. It has been held that he can set aside a survey and order another survey and issue a patent thereon, which is the exercise of judicial power. This right arises from the supervising power given him under the statute, and the courts have invariably sustained it, and in speaking of this class of powers have said:

> It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are, therefore, not provided for by express statute, may sometimes arise and therefore that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice. (*Williams* v. *United States*, 138 U.S., 524; *Knight* v. *United States Land Association*, 142 U.S., 181.)

In *McCulloch* v. *Maryland* (4 Wheat., 316, 421) Chief Justice Marshall said:

> The sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and the spirit of the Constitution, are constitutional.

It has now been established beyond controversy that Congress has the power to incorporate national banks and clothe them with large discretionary powers and for the purpose of accomplishing what Congress itself might directly do.

This power was maintained in *McCulloch* v. *Maryland* (4 Wheat., 316) and in *Osborn* v. *United States Bank* (9 Wheat., 738) mainly upon the ground that it was an appropriate means for carrying on the money transactions of the Government. (*Legal Tender Case*, 110 U. S., 445.)

Congress may, directly or *through corporations* created for that purpose, construct bridges or railroads for the accommodation of interstate commerce. (*California* v. *Central Pac. R. R.*, 127 U. S., 1; *Luxton* v. *River Bridge Co.*, 153 U. S., 525.)

In re *The Laura* (114 U. S., 411), although the pardoning power is, by the Constitution, vested in the Presi-

dent, the court held that an act authorizing the Secretary of the Treasury to remit fines and penalties incurred by a steam vessel was valid, and it held that to determine otherwise would be to overthrow the practice which had been observed and acquiesced in for nearly a century.

In *Dorsheimer* v. *United States* (7 Wall., 166) it was held that such power intrusted to the Secretary of the Treasury is one for the exercise of his discretion in a matter intrusted to him alone, and that it admits of no appeal to any court.

In all those cases in which it is held that executive officers of the Government will not be controlled by the court in matters in which they have to exercise judgment or discretion, it is apparent that large powers are intrusted by Congress under the acts investing them with authority, and that they really exercise in this way, by delegation, and necessarily so, for the purpose of carrying on the vast affairs of the Government and its details, authority which in a strict sense pertains to Congress. (See *Decatur* v. *Paulding*, 14 Pet., 497-514; *United States* v. *Guthrie*, 17 How., 284; *United States* v. *The Commissioners*, 5 Wall., 563; *Litchfield* v. *Register and Receiver*, 9 Wall., 575-577; *Cornick* v. *Lamar*, 116 U. S., 426.)

In *United States* v. *Breen* (40 Fed. Rep., 402) it was held that Congress can authorize the Secretary of War to make rules and regulations, and can make it a misdemeanor to violate these rules when so made.

In *United States* v. *Bailey* (9 Pet., 238) it was held that the crime of perjury, which was defined by statute, could be committed by taking an oath in conformity with a mere regulation of the Treasury Department.

In *Caha* v. *United States* (152 U. S., 219), in commenting upon this decision, the court said:

> It was held that the Secretary had power to establish the regulation, and that the effect of it was to make the false affidavit before the justice of the peace perjury within the scope of the statute, and this notwithstanding the fact that such justice of the peace was not an officer of the United States.

In the Caha Case the court upheld an indictment for perjury which grew out of proceedings instituted in accordance with regulations of the Interior Department.

These cases and the case under consideration differ from that of *United States* v. *Eaton* (144 U. S., 677), in which the court held that a failure to comply with regulations made by the Commissioner of Internal Revenue could not be punished. The reason was that the statute had not made such refusal an offense.

The court said:

> It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns, as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in section 41 of the act of October 1, 1890.
>
> Regulations prescribed by the President and by the heads of Departments, under authority granted by Congress, may be regulations prescribed by law,

> so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen where a statute does not distinctly make the neglect in question a criminal offense (p. 688).

The case under discussion has the element which was lacking in the Eaton Case, for the statute has distinctly made the neglect in question a misdemeanor.

The act of July 5, 1884, section 3, makes the Commissioner of Navigation's finding conclusive on all questions of interpretation growing out of the execution of the laws relating to the collection of tonnage tax. (*N. G. L. S. S. Co.* v. *Hedden*, 43 F. R., 17–25.)

Among the powers conferred upon Congress by the eighth section of the first article of the Constitution are the following:

> To provide and maintain a navy.
>
> To make rules for the government and regulation of the land and naval forces.

It was held in *Dynes* v. *Hoover* (18 How., 20), and the decision has never been questioned, that under this provision of the Constitution Congress has the authority to establish courts-martial.

It was further held that the decision of the court-martial in a matter where it has jurisdiction is final and can not be reviewed by the courts. (20 How., 83; *Johnson* v. *Sayre*, 158 U. S., 109.)

Congress, in establishing courts-martial, provided that the Secretary of the Navy is authorized to establish

"regulations of the Navy," with the approval of the President. (12 Stat., 565; Rev. Stat., sec. 1547.)

Pursuant to this authority, "regulations for the administration of law and justice" were issued on the 15th of April, 1870.

It has been held that such regulations have the force of law. (*Gratiot* v. *United States*, 4 How., 80; Ex parte Reed, 100 U. S., 22.)

Thus the legislative power is not exercised in detail, but a court is established in pursuance of the power conferred upon Congress, and the Secretary of the Navy is clothed with the power of making regulations to control the court.

This is one of the many instances in which it is essential for the operations of a great Government that matters of detail be intrusted by the legislative department to executive officers for the purpose of giving effect to legislative acts.

By article 34, Revised Statutes, section 1624, the proceedings of summary courts-martial are to be conducted under such forms and rules as may be prescribed by the Secretary of the Navy, with the approval of the President.

Here Congress has constituted a court and it has delegated to an executive officer authority to establish rules for its procedure.

By section 1547, Revised Statutes, the regulations issued by the Secretary of the Navy, and as they might thereafter be altered by him, with the approval of the President, are recognized as the regulations of the Navy.

In pursuance of these regulations Sayre became "a person in the naval service of the United States." He was tried by a court-martial, and the Supreme Court refused to review its findings. (*Johnson* v. *Sayre*, 158 U. S., 117.)

By an act of June 23, 1874 (18 Stat. L., 237, 240), an appropriation was made, to be expended under the direction of the Secretary of War, for the repairs, preservation, and completion of certain public works and, *inter alia*, "for the improvement of the harbor of Savannah."

A like appropriation was made by the act of March 3, 1875 (18 Stat., 459), "for the improvement of the harbor of Savannah, Ga."

Neither of these acts directed the manner in which these appropriations should be expended. The mode of improving the harbor was left to the discretion of the Secretary of War.

The legislative department declared that the improvement should be made, and devolved the determination of what would or would not be an improvement upon the Secretary of War.

It was contended that while Congress had the power to authorize the construction of a specific work it could not invest the Secretary of War with such large discretion, and that for this reason the act was void. The Supreme Court sustained the act in *South Carolina* v. *Georgia* (93 U. S., 13).

In that case, acting under the commerce clause, Congress authorized an improvement. It empowered the Secretary of War to determine what would or would not be an improvement, and so the act could not be made

effective without the action of the Secretary of War. If he determined the character of the improvement that was final, and the act operated upon it.

In the case at bar Congress makes the obstruction to navigation a misdemeanor. It devolves upon the Secretary of War to determine when there is an obstruction and to give the party a hearing upon the investigation. When this special tribunal has determined that there is an obstruction, then the act operates upon it as in the former case.

In *Miller* v. *Mayor of New York* (109 U. S., 385, 393, 395) it appeared that Congress authorized the building of a bridge over a river, but the particular bridge authorized was such as should thereafter be approved by the Secretary of War. After the Secretary of War fixed, by his approval, the character of the bridge, which was not an obstruction to navigation, then the act operated upon it and authorized the building of the bridge. Until then the legislative license did not go into effect. Here was a complete act in the abstract, but its operation in the concrete was dependent upon the determination of facts by the special tribunal. It was contended that this was an unlawful delegation of the power vested in Congress. The court held to the contrary, saying:

> By submitting the matter to the Secretary Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that upon a certain fact being established the bridge should be deemed a lawful structure, and employed the Secretary of War as

an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between the States, or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction is necessarily paramount and conclusive. It may in direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction; and, in the latter case, make its declaration take effect when those conditions are complied with.

The act in question, in requiring the approval of the Secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment or particular information. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate. (*South Carolina* v. *Georgia*, 93 U. S., 13.)

By section 2380, Revised Statutes—

The President is authorized to reserve from the public lands, whether surveyed or unsurveyed, town sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population.

Following strict construction, this would be a delegation by Congress of its legislative power.

In *Currier* v. *West Side Elevated Patent Ry. Co.* (6 Blatch., 487) it was held that authority conferred upon commissioners to approve an experimental elevated railroad, and making such approval essential to the continuance in existence of the railroad, was not a delegation of legislative power.

The creation of a railroad commission to fix reasonable tolls for freight and passenger transportation is not an unconstitutional delegation of legislative powers. (*Georgia* v. *Smith*, 70 Ga., 694.)

Neither is giving power to the governor to make pilotage regulations. (*Martin* v. *Witherspoon*, 135 Mass., 175.)

The statute providing for the civil service authorizes the Commissioners and the President to make rules for carrying the act into effect, and the President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof. (22 Stat., 403; sec. 1753, Rev. Stat.)

Under the *Act of February 8, 1887* (24 Stat., 388), power is conferred upon the President, when he shall have determined certain facts, to allot land in severalty to Indians on reservations.

In *Field* v. *Clark* (143 U. S., 649) it was held that Congress might confer authority upon the President to suspend by proclamation the operation of the law affecting the importation of certain articles upon his determination that any country producing such articles imposed duties upon the agricultural or other products

of the United States which in his opinion were reciprocally unequal or unresonable.

The court said:

> Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of the law. He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect. (Opinion, p. 693.)

The field of such discretionary powers is too vast and too familiar to need references for illustration. It requires but the slightest acquaintance with the great body of the laws to understand that powers of the most important character are constantly entrusted by the legislature to the judgment of other departments, individuals, or corporate bodies in relation to matters which the legislature undoubtedly might, if it saw fit, regulate or determine by the direct exercise of its own judgment. The power given to the judicial department to adopt rules of practice having the force of laws; the power given to the President to prescribe rules and regulations for the drafting of soldiers in time of war, are familiar illustrations, and it by no means follows that because the legislature *may* regulate a matter directly that it therefore *must* do so.

One of the earliest illustrations of the exercise of the principles of the referendum by the Congress occurred in the year 1846, when the Congress submitted to the people of the county of Alexandria the question of retrocession, and the popular assent having been given, the

county was reattached to the State of Virginia. (See 9 Stat., p. 35, and proclamation of President Polk, p. 1000.) This act of July 9, 1846 (9 Stat. L., 35), has been much cited by the courts as tending to show the constitutionality of lawmaking by vote of the people in the States, inasmuch as the method had been employed by the Federal Government.

It is not essential to the character and force of law that the legislative enactment should itself command to be done everything which is provided for in the act. The legislative power to command a particular thing to be done includes the power to authorize it to be done. The act under authority conferred by the legislature is precisely as legal and valid as if done in obedience to a legislative command. Each is entitled to the same force and efficacy, and each must be followed by all the consequences which, either by the general law or by the particular statute, are annexed to the particular act, because each is done in effectuation of the legislative will, and each when done according to that will has all the sanction which the legislative power can give. Each is therefore entitled to the aid of the whole power of the Government to uphold it and to maintain the rights which flow from it. The peremptory statute is at once mandatory and requires obedience, and thus is at once a perfect law in all respects. A statute giving authority to do or not to do and prescribing the consequences of the act when done has not, until the act is done, any mandatory effect requiring immediate obedience, except so far as it regulates the time and manner of doing the act and expressly or impliedly commands that the agent

shall not be prevented from doing it according to the discretion allowed. Beyond that it has not a mandatory effect until the act is done, and it is not till then a perfect law as to all the purposes provided for. In other words, it does not take its final effect as a mandatory law until the discretionary act is done upon which it is to have its final and peremptory operation. So far as the statute confers authority and discretion it is as obligatory from the first as the legislative power can possibly make it. And although its further practical efficacy may depend upon the discretionary act of some other body or individual, it is not derived from that discretion, but from the will of the legislature which authorized the act and prescribed its consequences.

Half the laws on our statute books are enacted in the alternative, depending upon the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them; but it is uniformly held that the exercise of such discretion is in no sense to be regarded as the making of the law. The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done, but to the latter there can be urged no valid objection.

*In re Richard Oliver*, 17th Wis., 681;
*Slack* v. *The Railroad Co.*, 13 B. Mon.;
*Railroad Company* v. *The Commissioners of Clinton County*, 1 Ohio State, 88;
*Locke's Appeal*, 72 Pa. State, 491.

It is therefore submitted that the act under consideration does not delegate to the Secretary of War any legislative or judicial function, but, on the contrary, merely creates that officer the agent to carry out the legislative will in removing or abating obstructions upon navigable streams; and that the act, upon the authority of the decisions of this court referred to, is in all respects a lawful and proper exercise of the legislative function, and as such should be upheld by the judiciary.

## II.

THE TIME GRANTED BY THE ORDER OF THE SECRETARY OF WAR WITHIN WHICH THE REQUIRED ALTERATIONS SHOULD BE MADE WAS A REASONABLE TIME WITHIN WHICH TO ACCOMPLISH THE SAME, BOTH IN FACT AND IN LAW.

The second point covered by the various assignments of error is that the time within which the designated alterations in the bridge were required to be made was unreasonable in this, to wit, that, although the notice to make said improvements was given on February 21, 1891, and the improvements required to be made on or before September 20, 1891, a period of seven months, and it is not pretended that the improvements could not have been made within that time, yet there were no funds available for this purpose in the hands of the county commissioners during the said period; that they could not, under the laws of the State of Ohio, levy any special tax for this purpose which

would have become available within the prescribed period, and that they failed to obtain from the legislature a special appropriation for such purpose, and hence the order practically required the accomplishment of an impossibility because of this absence of funds.

When we come to examine all the facts connected with this transaction, however, it will be readily seen from the evidence disclosed in the record that this plea of unreasonableness of time was a mere afterthought on the part of the plaintiffs in error, urged for the first time upon the trial of the cause in the court below, never relied upon or suggested as an excuse for their failure to comply with the orders of the Secretary of War, and that the assignment of it as an error is a mere technical pretense to escape the consequences of their deliberate refusal to comply with the orders of the Secretary of War, which said refusal was based, not upon any lack of funds to carry out the provisions of the order, but upon their denial of the authority of the Secretary of War to give such notice or to require them to make such alterations in the bridge.

On pages 35–50 of the transcript there is set up, as Exhibit A to the testimony, all of the correspondence had between the Secretary of War, the engineer officers of the Government directly in charge of this work, and the county commissioners of Muskingum County, which said correspondence embraced in said Exhibit A is introduced in evidence by consent of the parties. (See transcript, p. 10, folio 13.)

From this correspondence it will be observed that although the actual notice from the Secretary of War, as

contained on page 48 of the transcript, was not issued until February 25, 1891, yet the matter was first discussed between Col. William E. Merrill and the commissioners of Muskingum County by the former's letter of December 19, 1890, in which said commissioners are informed that said bridge between Taylersville and Duncans Falls had been reported by him to the Secretary of War as an obstruction to navigation, with the object of requiring an alteration in said bridge under the provisions of sections 4 and 5 of the act of September 19, 1890, and advising said commissioners that full opportunity would be given to them to meet such complaint and to submit such statements, propositions, and evidence in reply to said complaint or bearing on the subject as said commissioners should deem pertinent, and for that purpose Colonel Merrill designated the United States engineer's office at Zanesville, Ohio, at 10 a. m. on the 6th of January, 1890, as the time and place at which such defense might be made by said commissioners.

The first reply to the complaint that this bridge was an obstruction to navigation is contained in the letter from the county commissioners of Muskingum County to the Secretary of War, dated Zanesville, Ohio, February 3, 1891 (Record, pp. 36, 37), in which said letter the Secretary is informed by said commissioners that they deny the authority of the United States to require this alteration in the bridge, unless done at the expense of the Federal Government, inasmuch as said bridge had been built and was in operation at the time the Government accepted the improvements of the Muskingum River from the State of Ohio, and was at that

time a lawful structure, erected under and by virtue of authority from the general assembly of Ohio.

It will be noted that there is no suggestion here of a lack of funds in the county treasury with which said alterations can be made, but a mere denial of the legal right of the Secretary of War to require the same to be done by the county. Long prior to this time, to wit, on October 28, 1889, the commissioners of said county had been informed that said bridge was an obstruction to navigation, and that it would be necessary to place a draw in said bridge to remedy this defect, and Lieutenant Gillette, in this letter, is directed to see the commissioners personally and find out their views in the matter, and Colonel Merrill informs Lieutenant Gillette that if they will place the draw in the bridge by the following summer he will take no official steps in this matter, but that it is necessary to have the decision of the commissioners on this subject before long, inasmuch as this obstruction to navigation can not be permitted to remain indefinitely. (See letter of Merrill to Gillette, transcript, bottom of page 39.)

On January 6, 1890, Lieutenant Gillette writes to Colonel Merrill (record, p. 40,) as follows:

> Referring to the matter of the draw in the Taylorsville bridge below New Lock No. 9, the county commissioners, without expressing an opinion as to the legal merits of the case, decline to make the alterations in the Taylorsville bridge unless they are compelled to do so. They give as a reason for this that they wish to protect themselves against criticism from the taxpayers. If ordered to alter the

bridge they propose to employ legal talent toward resisting it.

Here again, we observe that there is no pretense of a lack of funds with which to accomplish the required changes, but merely a desire to protect themselves from the wrath of the taxpayers.

On January 22, 1890 (record, pp. 40, 41), Colonel Merrill again addressed a communication to the commissioners of Muskingum County, calling their attention to this matter and again informing them that they would have opportunity on February 4, at 12 m., at the office of the United States engineer at Zanesville, Ohio, to make such verbal or written defense as they desired to offer. This latter was answered January 24, 1890, by J. A. Knight, informing Lieutenant Gillette that the commissioners would appear before him on the day named, to wit, February 4, 1890 (transcript, p. 41), and on that day the following defense, as it appears on page 42 of the transcript, was presented by said commissioners at said hearing:

> Replying to yours of the 22d ultimo, would state that the undersigned commissioners decline to take any steps toward placing a draw in the bridge, on the grounds that the bridge was built under proper authority and was not an obstruction to navigation, as the same was provided for by a draw span over the canal. The abandonment of the canal and requirement of a channel through what is now a continuous span was the act of the United States authorities, and said commissioners insist that the Government should bear the expense of making the change in the bridge.

This letter is signed by the commissioners of Muskingum County, and in it there is, as usual, no thought or suggestion that the required changes can not be made because of lack of funds in the county treasury, and the refusal to make the alterations still proceeds upon the flat denial by the commissioners of the legal right of the Government to require the same.

And again, on August 20, 1890 (record transcript, p. 44), the said commissioners of Muskingum County addressed a communication to the Secretary of War relative to the alteration of this bridge in reply to the former's letter to them of August 8, in which they say:

> Upon due consideration the board of county commissioners have decided that they are not responsible for the obstruction named, and respectfully decline to take any action in the premises without a decision of the proper court.

And again, there is an utter absence of any suggestion of thought of a lack of funds with which to accomplish the required changes. Then follows the letter from Colonel Merrill to said commissioners, dated December 19, 1890 (transcript, pp. 45, 46), in which they were required to make certain specific changes in the bridge and were given until Tuesday, January 6, 1891, within which to appear and make any defense that they desired to make to said order. In reply to this communication the county commissioners answered, under date of December 23, 1890, and stated that inasmuch as sufficient legal advice has not yet been obtained by the board, it desires until February 1, 1891, to present its side of the case to

the engineer. (Record, p. 46.) This request was granted, and on February 3, 1891 (record, pp. 46, 47), the report was made upon said hearing by Lieutenant Gillette to Colonel Merrill, in which it is stated:

> I have to inform you that the county commissioners of this county were to-day given a hearing in the matter of the bridge * * * at Taylorsville-Duncan's Falls, in accordance with your letter of December 19, 1890. The commissioners stated that they would decline to make the changes required in the bridge, and submitted letters suggesting that the matter be referred on an agreed statement of facts to the United States court for this district; but on ascertaining that they had not been ordered to make the changes under the act approved September 19, 1890, they withdrew these letters and subsequently submitted two letters, which are inclosed herewith. I would suggest that a recommendation be sent to the Secretary of War that the necessary orders for the alteration of the bridge be sent immediately and that the time for making the alterations be limited to one month.
>
> In order that such limitation should not appear unreasonable, the order should state that the time would be extended at the request of the commissioners, if made before the expiration of the month. The reason of this is that the commissioners will not make the alteration until they are ordered to by the courts, and the sooner the matter is thrown into the courts the better it will be for all parties concerned, since the bridge can be altered best next season under cover of the Government cofferdam. *The commissioners are anxious to get the matter into the courts as soon as possible, and it was their suggestion that the time for the completion be limited.*

Pursuant to this recommendation, the Secretary of War issued the necessary notice on February 25, 1891, requiring the specific alterations in said bridge to be made and completed on or before September 30, 1891, and upon the willful failure and refusal of said commissioners to make the alterations as provided for in said order, proceedings were instituted against them in conformity with the provisions of the said act of September 19, 1890.

It will thus be observed that from the inception of this matter down to the actual hearing in the court below there was never any thought or suggestion on the part of the plaintiffs in error that the alterations in this bridge could not be made by them because of a lack of funds for that purpose. In the various hearings which the engineer officers gave to these gentlemen no such defense was ever offered. It was at no time pretended that the time notice within which the required alterations were to be made was unreasonable or improper, nor was any extension of it ever asked for by the plaintiffs in error.

On the contrary, as shown by this documentary evidence, the failure to comply with the orders of the Secretary of War was based upon a flat denial of the right of the Government to require such alterations or changes, except at its own expense, and the positive refusal to comply with the order, unless except and until so ordered by a court of competent jurisdiction; and in order that the legal questions involved might be determined as speedily as possible, the commissioners thus suggested and desired that the time be made as short as possible,

and it was even suggested that a limit of one month be specified in the order requiring the limitations.

Instead, however, of placing such a limit, the commissioners were given seven months within which to accomplish the work, and, as is shown by all of this correspondence, would undoubtedly have been granted any further additional time that they might have required or that the exigencies of the situation might have demanded if they had shown the slightest desire or intention of complying with the orders of the Secretary of War.

The fact that the absence of funds with which to make the required alterations was not relied upon as an excuse and was not presented as a reason why such time limit was unreasonable, as further shown by the testimony of J. F. Burgess, one of the plaintiffs in error, which is the only oral testimony bearing upon this subject. On page 31 of the transcript, he testifies as follows:

> Q. Didn't you give your refusal in the month of December to do anything?
>
> A. I don't remember just when it was.
>
> Q. Did you refuse to do it; did you make this question of want of funds any reason for refusing?
>
> A. I don't know that we did.

Colonel Merrill and Lieutenant Gillette both testify (record, p. 10 and p. 16) that the time within which said alterations were required to be made was, in their opinion, reasonable and ample. There is no testimony tending to show, and no pretense anywhere in the record, that the required alterations could not have been made within the time specified in the order, to wit, between February 25 and September 30, 1890.

If the work had been begun, or if the commissioners had levied the tax or taken any steps which evidenced an intention in good faith to comply with the orders of the Secretary of War, there can be no doubt, as gathered from the whole spirit and tenor of the correspondence upon this subject, as found in the transcript, that the time within which the changes should be made would have been cheerfully extended by the proper authorities. (See Transcript, p. 47.)

This bridge is a complete obstruction to the navigation of the Muskingum River (Record, p. 9 and p. 15). For example, Lieutenant Gillette, on page 15, testifies as follows:

> Q. Well, now, the bridge as it is there now, what obstruction, if any, is it to navigation of the river, Lieutenant?
>
> A. It is a perfect obstruction; a complete bar to the navigation of the river.

Now, shall this complete obstruction, this perfect bar to the navigation of the Muskingum River, be permitted to remain in place for an indefinite period of time, because, forsooth, there are no funds available in the county treasury with which to make the required changes which shall remove the obstruction to navigation, when the whole record and transaction shows that no effort has been made to obtain funds, that the absence of funds has never been urged as a reason for a failure to remove the obstruction, when the failure to remove the obstruction is due wholly to a denial of the right of the Government to require the same to be removed, and when there is no hope or promise that any funds ever will be available in the county treasury for this purpose?

It has already been shown in one of the answers of the county commissioners that they refused to levy a special tax for this purpose under and pursuant to the laws of the State of Ohio authorizing and empowering them so to do, because, as expressed by them, they desired to escape the criticism of the taxpayers; and we may take it as a governing principle that continues to the end in all county offices of this sort that this desire to escape from the wrath of the taxpayer is greater than a desire to obey the lawful orders of the Government of the United States, and the failure to obtain the requested funds by taxation in the future, as in the past, will be blocked by this fear of the wrath to come.

The only way in which the necessary funds for this purpose ever can or ever will be raised is to establish the legal duty of the county commissioners so to do by an affirmance of the judgment of the court below, and thus impose upon them an obligation enforcible by the arm of the law from which they can not escape. If we are to be told that under the provisions of this act a notice of this character is only reasonable when the time specified in it shall embrace such a period as finds the coffers of the county treasury filled with money which may be used for this purpose, then the statute, so far as it is to have any efficacy over public works of this character which are owned by any State or county or municipality, might as well be effaced.

There is some point made in the brief of the learned counsel for the plaintiffs in error to the effect that the order came too late to enable the county commissioners to obtain from the legislature a special act authorizing the

collection of money for this purpose; but here again we find the defense more imaginative than real. The only testimony in the record which bears at all upon this subject is in the cross-examination of Mr. Burgess, one of the plaintiffs in error, who, on page 31 of the transcript, testifies as follows:

> Q. When did you refuse to do it? Did you make this question of want of funds any reason for refusing?
>
> A. I don't know that we did.
>
> Q. Up to this point did you take any steps at any time to raise money for this purpose?
>
> A. I think it was done.
>
> Q. Well?
>
> A. Our members of legislature were talked to in that matter.
>
> Q. Did you get any authority?
>
> A. It was too late, too near the end of the session, and nothing was done.

It will be observed that there is no pretense that any bill was introduced into the legislature for that purpose. The witness merely says that "our members of the legislature were talked to about the matter"—evidently meaning by "our members" the members of the legislature from Muskingum County. The very best, therefore, that can possibly be made out of this testimony (and this is all there is on the subject), is that there was some sort of desultory conversation, perhaps, between the commissioners of Muskingum County and the members of the legislature from that county, concerning this matter generally, toward the close of the session.

It is not shown that any bill was introduced for the purpose, it is not shown that any effort was made to get

the sanction of the legislature, it is not shown that any *bona fide* attempt was ever, at any time, by anybody, in any way, made to raise the funds with which to make the required alterations in this bridge.

Under the charge of the learned judge below (p. 34), the question of the reasonableness of this notice was left to the jury, the language of the charge being as follows:

> That the Congress had the constitutional power to confer upon the Secretary of War the authority to determine when a bridge such as the bridge in question is an unreasonable obstruction to the free navigation of a river, and that the failure to comply, by the persons owning and controlling any such bridge, as by the defendants in this case, if they should so find, with such a determination by the Secretary of War, *after due notice* and otherwise full compliance with the act of Congress in that behalf, lawfully subjected thereto by prosecution for a misdemeanor, as provided by the act of Congress.

We submit, therefore, that the learned counsel for the plaintiffs in error are mistaken when they say that under this charge there was nothing left for the jury to do except to find the defendants guilty. The question of the reasonableness of this notice was left to the jury by this charge, and was passed upon by them in their verdict as guilty. And this judgment of the jury was sustained by the court in its refusal to set aside the verdict and grant a new trial, because the same was contrary to the law and the evidence.

There was no error in submitting this issue to the jury, nor was there any error in refusing to grant a new trial upon the ground that the finding of the jury to the

effect that this was a reasonable notice was contrary to law and evidence. The learned counsel for the plaintffs in error have cited the case of *Wiggins* v. *Burkham* (10 Wall., 132) and *Tolan* v. *Sprague* (12 Peters, 336) in support of the proposition that where the facts are clear what is a reasonable notice or a reasonable time is always a question exclusively for the court, and that therefore the court erred in failing to set aside the verdict of guilty, because they contend that the evidence clearly showed that the time allowed was unreasonable.

The record, however, does not support such contention. It was testified to by both of the witnesses on behalf of the Government (Record, pp. 10 and 16) that the length of time prescribed by this notice was a reasonable time within which to make the changes prescribed in the plan. No witness was introduced by the defendants below to dispute this, and it remains uncontradicted, and there is no pretense that the changes as prescribed by the plan could not have been made within the time specified.

The only evidence relied upon is that of one of the plaintiffs in error, who testifies in a hesitating sort of way that there were no funds available for that purpose (see record, pp. 30 and 31), without pretending that such failure of funds was ever assigned by the plaintiffs in error as a reason for their failure to comply with the orders of the Secretary of War, or that they ever requested an extension of time for that reason, or that they ever claimed the time given to be unreasonable for that reason, or that they ever made any effort at all to procure the funds with which to do the work.

The very best, therefore, that can possibly be made out of this testimony is that the evidence concerning the reasonableness of the time was conflicting; and under such conflicting evidence it became not a matter of law for the court, but a mixed question of law and fact to be submitted by the court to the jury in its instructions, just as was done by the court below. In the case of *Wiggins* v. *Burkham* (10 Wall., 133), while the court admits that where the facts are clear and undisputed a question of this sort is one for the court, yet the court says:

> Where the proofs are conflicting the question is a mixed one of law and fact. In such cases the court should instruct the jury as to the law upon the several hypotheses of fact insisted upon by the parties.

The record does not show that the plaintiffs in error requested the court to instruct the jury upon any other hypotheses of fact for which they contended, nor is it shown that any prayer concerning this fact was asked for by the plaintiffs in error and denied by the court below. We submit, therefore, that the instructions of the court fail to show any prejudicial error to the defendants below upon which reliance can be had for the reversal here.

And this action by the trial court will not be disturbed by this court, especially when it is shown that this lack of funds is not and never has been the real reason for the failure to make the alterations and improvements required by the Secretary of War, but is a mere afterthought—a mere technical pretext—adverted to for the first time in the actual trial of the case and relied upon for the reversal of the judgment, when the real ground

of the refusal is the denial of the right of the United States to require the alterations to be made.

In the practical administration of this matter there will be no hardships, there will be no unreasonableness. If there is any *bona fide* lack of funds, or any *bona fide* application for the extension of time, there will be no difficulty in having such time extended, as the exigencies of the case may require. What is sought is an authoritative determination that the Secretary of War, under the provisions of the act of September 19, 1890, has the legal right to require this bridge to be so remodeled so as not to interfere with the navigation of the Muskingum River. This once established, the practical administration of that power may be safely left to the executive officers in whose hands the Congress has placed it.

It is therefore submitted that the judgment of the court below should be affirmed.

GEORGE HINES GORMAN,
*Special Attorney for the United States.*
JOHN K. RICHARDS,
*Solicitor-General.*

No. 40.
Sup. Ct. of Atty. Genl
v. Rickards

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SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

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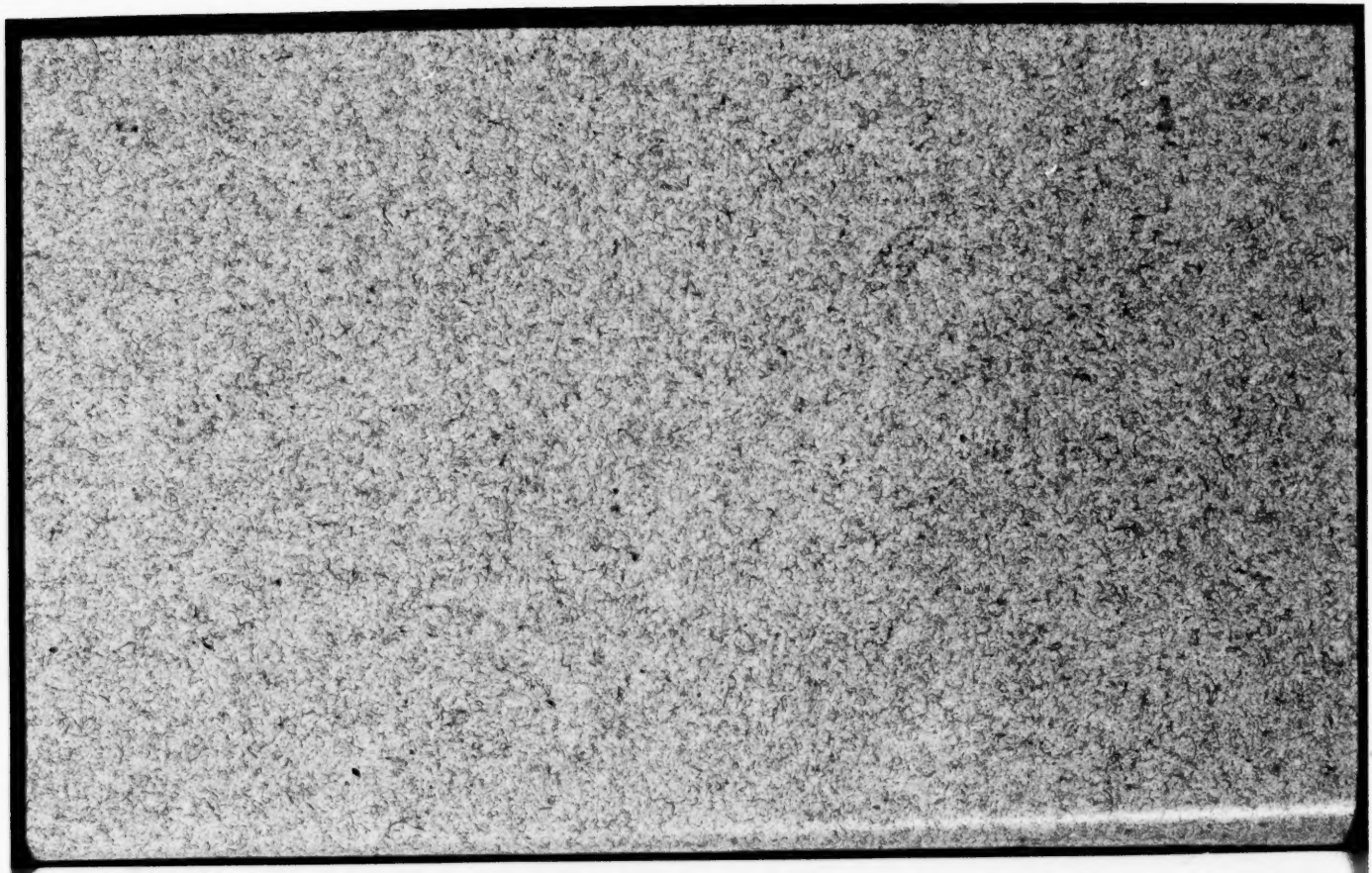

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**SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.**

In the original brief of the defendants in error it was contended that the doctrine which inhibits the redelegation of a delegated power is the limitation placed upon the principle that whomsoever does a thing through another shall be considered as having done the thing himself; and that the doctrine had to do primarily with the law of individual agency, but that the doctrine, so far as it be applied to the exercise of legislative functions

strictly by the legislative body is true only in a qualified sense and should not be taken in the strict application that is given to it when applied to the law of agency as affecting individuals; that the qualifications of this doctrine as applied to the exercise of governmental functions are becoming larger and larger every day, and must of necessity become larger as the demands of civilization increase, and that there is noticeable in all of the modern decisions a tendency in the direction of assigning duties hitherto deemed legislative, to other bodies, to boards and commissions, to local authorities, to executive officers, and particularly to the votes of the people themselves.

It is a noteworthy fact that in this court there has never been a decision whereby a law has been declared unconstitutional because it delegated to other agencies powers which this court thought could be only exercised by the Congress, and although such contention has been made in this court over a great number of acts of Congress, such a contention has never yet succeeded. In the State courts, however, there have been decisions against the constitutionality of laws of this character founded upon this reason, but such decisions were rendered in the early history of the country, when it was supposed to be necessary to draw the line sharply between the executive, the judicial, and the legislative branches of the Government, and when the governmental doctrines of Montesque were received with almost universal sanction; but the overwhelming trend of modern decisions is the other way, and the decisions invalidating such laws for such reasons have latterly come to be doubted or denied, or explained away, or openly reversed even in the supreme courts of

the States in which they were rendered. The multiplied activities and feverish unrest of our intense modern civilization precludes the possibility of a strict application of the academic theories which prevailed in the early days of the Republic. And the absolute necessities of modern life have produced in the courts a responsive limitation upon this as well as upon many another antiquated doctrine.

These results have not always been reached in the same way in the various courts, but their practical result remains always the same. Certain things have been held to be consistent with the rule that power can not be delegated, which, perhaps, in their ultimate analysis may be found to be, in fact, a delegation of authority rendered necessary in the practical administration of the Government. It is immaterial what nomenclature be used, whether the result brought about would be a modification of the maxim that power lodged in one department of the Government can not be delegated, or whether it be a refinement upon the facts as to whether or not there has been a real delegation. The practical solution of the problem is the same, and it has always been reached by a wise judiciary, whether pursuing one line of reasoning or another.

It becomes no less interesting than instructive to investigate the position of the various State courts upon questions of this character, and the object of the present supplemental brief is to make a brief, but comprehensive, examination into the present status of this doctrine as administered by the judiciary of the various States.

Questions of this character did not reach the State

courts in any quantity prior to 1850; such legislation before that time had been comparatively rare and of a kind not to involve any very important contending interests. As soon, however, as the legislatures began the passage of laws allowing counties, townships, and municipalities to subscribe to stock in railroads, which necessitated the increasing of tax levies, and laws prohibiting the liquor traffic, and of laws permitting the whole or a part of the people of the State to register their will upon the passage of certain acts, the issues were soon sharply defined and were taken to the courts for determination, and from this time on there were many judicial opinions given in the various State tribunals in regard to the constitutionality of this method of lawmaking, and that at this day nearly all the States of the Union have come to have an established policy on this subject. By far the most important class of cases in which this doctrine has been discussed have been those in which the proposed law was first submitted to ratification or rejection by a vote of the people, and the decision in this class of cases may be selected as illustrating the position of the State courts on this subject. The question has appeared in the courts in several forms and may be conveniently classified as follows:

First. Whether the legislature of a State could enact laws applying to local districts of the State, which depended for their effect upon the assent of the people inhabiting those districts.

Second. If the legislature possessed such power, then whether it could pass a law to be conditioned upon the popular consent on any subject, such as the licensing or

prohibition of liquor traffic, or to other police regulations, or only upon subjects affecting the local tax levies charged in county seats, county boundaries, and the like.

Third. Even if it could submit laws relating to the local districts, whether the legislature could submit laws to the people of the entire State.

The constitutionality of laws of this character was upheld in Massachusetts as early as 1826 (*Wales* v. *Belcher*, 3d Pick., 508), where the question arose upon the constitutionality of the law determining the jurisdiction of the courts in Boston, which was made to depend upon the contingency of the acceptance by the inhabitants of the town of Boston of an act which constituted that city a town. And in Virginia, as early as 1837 (*Goddin* v. *Crump*, 8 Leigh, 120), a State law was held to be constitutional which authorized the city of Richmond to subscribe to stock in a canal company, provided the people of said city gave their assent thereto in an election to be held for that purpose. The opinion in this case was delivered by Mr. Justice Tucker. And so in Maryland a law for the establishing of primary schools within such county of the State as should by popular vote determine to accept its provisions was upheld in 1844. (*Burgess* v. *Pue*, 2 Gill., 11.)

The case, however, which is usually referred to as being the first notable discussion of this question is that of *Rice* v. *Foster* (4th Harr., 479), which came before the supreme court of New Jersey in 1847, and arose upon the State act of February 18, 1849, "authorizing the people to decide by ballot whether licenses to retail

intoxicating liquors shall be permitted among them." The counties were to vote "license" or "no license" on the first Tuesday of April, 1847. The court of errors and appeals decided the law to be unconstitutional and placed their decision upon the ground that this was a delegation of legislative power to the people which could properly be exercised only by the legislature itself. In November of the same year the question came up for discussion in the supreme court of Pennsylvania in the case of *Parker* v. *The Commonwealth* (6th Barr., 507), which was a case also of local option liquor law and was held to be unconstitutional, which case was subsequently overruled. In the light of modern history it is amusing to read the reasons given by the courts in these two cases for their decisions, being founded, as they are, upon the timorous fear that such legislation would subvert the principles of a representative republican government into that of a democracy, and the reply to such fears by the supreme court of Illinois, rendered in 1848 in the case of *The People ex rel.* v. *Reynols* (5 Gilm., 1), is conclusive. The court there inquired that if, by leaving this question to the people, the republican form of government is to be overturned and its principles subverted by a miniature democracy, may not the same awful calamities be apprehended from a miniature monarchy? In that case the supreme court of Illinois upheld an act of the legislature whereby a question was submitted to the vote of a county whether the district embraced therein should be divided and organized into two counties, the court placing its decision upon the thoroughly sound principle that a law may depend upon

a future event or contingency for its taking effect, and that that contingency may be made to arise from the voluntary act of others.

A decision arising out of a local option liquor law, similar to those which had been recently declared unconstitutional in Delaware and Pennsylvania, was delivered by the supreme court of Vermont in 1849, in the case of *Bancroft* v. *Dumas* (21 Vt., 456), wherein the constitutionality of the law was upheld, and the Vermont court fortified itself in this opinion in 1854, in the case of the Maine liquor law (*State* v. *John Parker*, 26 Vermont, 35), and in this case the court said:

> It is admitted on all hands that the legislature may enact laws the operation or suspension of which shall be made to depend upon a contingency. This could not be questioned with any show of reason or sound logic. It has been practiced in all free States for hundreds of years, and no one has been lynx-eyed enough to discover or certainly bold enough to declare that such legislation was on that account void or irregular, and it is, in my judgment, a singular fact that this remarkable discovery should be first made in the free representative democracies of America.

And certainly in all of the years since then it has been the habit of the people of the States to cure this dreaded disease of democracy by the application of more democracy in true homeopathic style—*similia similibus curantur*. In 1849 the court of appeals of Kentucky declared to be constitutional an act of the legislature authorizing a vote of the people of Louisville upon a proposition to subscribe stock of a railroad company. (*Talbot* v. *Dent*, 9

B. Mon., 526.) See also *Slack* v. *The Railroad Company* (13 B. Mon., 1).

In 1853 the court of appeals of New York rendered a decision, which has since become famous, in which the positions previously taken by the courts of Delaware and Pennsylvania in *Rice* v. *Foster* and in *Parker* v. *The Commonwealth*, respectively, were upheld. This case (*Barto* v. *Himrod*, 4 Seld., 483) turned upon the constitutionality of an act which the legislature had passed in 1849, known as the free-school law, which was not to go into effect until ratified by the people at an election to be held for that purpose, and the court held the law to be unconstitutional as a delegation to the people of legislative functions.

A case arising out of a law authorizing a vote of stock in aid of a railroad company reached a decision in the supreme court of Ohio in 1852 (*Railroad Company* v. *Clinton County*, 1 Ohio State, 77), in which the court, although recognizing the general principle that a general assembly can not surrender its legislative functions, yet it is permissible for the legislature to pass a law requiring the intervening assent of other persons or containing provisions preventing such law from taking effect only upon the performance of conditions expressed in the law. The discretion given in such a law relates only to its execution. It may be employed or not employed; if employed, it rules throughout; if not employed, it still remains the law, ready to be applied whenever the preliminary condition is performed.

From this time on there have been many judicial opinions given in the State tribunals in regard to the consti-

tutionality of this method of lawmaking, and nearly all of the States of the Union have by this time come to have an established policy on this subject. By far the larger number of decisions have been in favor of the method, but the courts have found different lines of argument, some reaching their conclusions in one manner and some in another. Those States which may be regarded as favoring this method of legislation are Alabama, Arkansas, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Vermont, Virginia, and Wisconsin.

In Alabama (*Clark* v. *Dorincy*, 60 Ala., 271) and Colorado and Nebraska the constitutionality of this method of legislation has been recognized, though in no very notable cases.

In Arkansas the validity of local option laws was recognized in 1879 (*Boyd* v. *Bryant*, 35 Ark., 69). This opinion was subsequently reaffirmed and amplified in the case of *Trammel* v. *Bradley* (37 Ark., 374), where the court, while recognizing the general doctrine that a legislature could not delegate the power to legislate, yet affirmed that it could make a law to depend upon a contingency, which contingency might be a favorable vote of the people. The court said:

> It must be confessed that the question was not originally without grave difficulties; but now, upon a view of all the authorities and weighing the dangers and inconvenience of each side, the court

adheres to the views taken in *Boyd* v. *Bryant*, and this, we think, is sustained by the weight of authority, as well as of reason.

In Connecticut the local option law of 1874 was declared to be constitutional in the case of *State* v. *Wilcox* (42 Conn., 364); and in this case the court drew a distinction between the means of exercising a power by the people and by the legislature, and were of opinion that the people could more intelligently exercise the discretion and judgment upon matters of this sort than could the legislature itself, and that the doctrine which inhibits the redelegation of delegated powers was not applicable to a case of this sort, because no power was delegated which the constitution required the legislature to exercise, and that the power so delegated was not, properly speaking, legislative in its character, and might be more appropriately exercised by the municipalities and local functionaries to whom it was committed.

In Florida the question came before the supreme court in 1856, in an attack that was made upon the constitutionality of an internal improvement law, whereby counties, cities, and towns were empowered to subscribe stock to railroads after securing the popular assent. The court held that this was not a delegation of legislative power, but only a legitimate mode of obtaining an expression of the will of the constituent as a guide for the action of the representative. (*Cotton* v. *The County Commissioners of Leon County*, 6th Fla., 610.) Subsequent decisions in this State are of similar effect. (*State* v. *Brown*, 19th Fla., 593; *Commissioners of Lake County* v. *The State*, 24th Fla., 263.)

In Georgia a distinction appears to obtain similar to that which obtains in New York, between the constitutionality of an act which submits local questions to a vote of the people, and those which submit the question to the people of the whole State, the former being upheld and the latter condemned. And, while no act which submitted the question to the people of the whole State has ever been declared to be unconstitutional in this State, yet the New York distinction is recognized as a sound one in the opinion of the court in the case of the *Mayor of the City of Brunswick* v. *Finney* (54 Ga., 317), but the court recognizes such distinction "without committing ourselves upon the general principles." The constitutionality of the act permitting a change in the charter of the city of Brunswick, which the legislature prescribed should not go into effect until assented to by a vote of the people of that city, was declared to be constitutional, and so was the act of 1883, passed to prohibit the sale of liquor in Pike County, submitting the question of the law's acceptance or rejection to the voters of that county (*Caldwell* v. *Barret*, 73 Ga., 604).

In Illinois the principle that the people had a right to a direct share in the making of their laws was very early established, the leading case being that of *The People ex rel.* v. *Reynols* (5 Gilm., 1), which has already been adverted to, and in which case the principle was stated that a law might depend upon a future event or contingency, and that contingency might be an approving vote of the people. This principle has been restated by the court several times and is now the settled law of the State. (See *People ex rel.* v. *Solomon*, 51 Ill., 37; *Home Insur-*

*ance Company* v. *Swigert*, 104 Ill., 653; *The People ex rel.* v. *Hoffman*, 116 Ill., 587.)

In Kansas legislation of this kind was approved in 1865, authorizing the counties and cities, on a vote of the people, to subscribe stock to railroad corporations. (*Leavenworth County* v. *Miller*, 7th Kans., 298.) In *Noffzigger* v. *McAllister*, decided in 1873 (12th Kans., 250), the "Night herd law" of 1868, authorizing county commissioners to order stock shut up at nighttime, upon petition of the majority of the electors of the county, was sustained, the court saying that "the act resembles many other acts which depend for their practical operation upon the discretion of the county board, or the people, or the happening of certain contingencies." And in 1868, in the case of *State ex rel. Hunter* (38 Kans., 578), the court said:

> The validity of laws, the operation of which is made to depend upon the occurrence of some future event or contingency, certain or uncertain, can not well be doubted; that contingency may be the vote of petition by a certain number of the people to be affected by the law.

In Kentucky this method of legislation was declared to be constitutional in 1849 in the case of *Talbot* v. *Dent* (9 B. Mon., 526), and in 1852 in *Slack* v. *Railroad Company* (13 B. Mon., 1), both of which have already been referred to. In 1877 (*Anderson* v. *The Commonwealth*, 13 Bush., 485) the court upheld a local-option law, and in another opinion concerning the same law (*Commonwealth* v. *Weller*, 14 Bush., 218) the court said:

> The legislature, by the passage of the act we are considering, had already determined its expediency,

> and we perceive no reason why its going into operation should not be made to depend upon a vote in favor of the measure. That a statute may be conditional, and its taking effect be made to depend upon some subsequent event, is now well settled.

And the views here expressed were reaffirmed in 1877 in the case of *Burnside* v. *Lincoln County Court* (86 Ky., 423).

In Louisiana, the supreme court in the case of *Police Jury* v. *McDonough* (8 La. An., 341), said:

> If the legislature could constitutionally confer on the police jury authority to pass a taxing ordinance it would seem rather a safeguard against oppression than the reverse to qualify the power of requiring it to be exercised with the approbation of the majority of those who are to bear the burden. * * * We find nothing in the statute of 1852 repugnant to the constitution or the support of representative government, and it seems a matter of surprise to us that the caution of the legislative in its grant of the taxing power should be made the subject of reproach.

This view was affirmed by the court in *New Orleans* v. *Graihle* (9 La. An., 561), a case arising out of the same law of 1852 relating to subscriptions of stock to railroad companies.

In Maryland a law establishing a system of primary schools in those counties which should vote to accept the provisions of the act was declared constitutional in *Burgess* v. *Pue* (2 Gill., 11), which case has already been referred to. The same question arose in a case between the same parties, reported in 2d Gill., 254, and the constitutionality of the law was again sustained. A like decision was rendered in 1866, in the case of *Hammond* v.

*Haines* (25th Md., 544), and the constitutionality of the law authorizing the voters of a borough to decide by ballot whether or not licenses should be granted to sell liquor was likewise fully sustained in 1874 in the case of *Fell* v. *The State* (42d Md., 71).

In Massachusetts the policy of the supreme court in such cases was established as early as 1826, in the case of *Wales* v. *Belcher* (3d Pick., 508), which opinion has already been adverted to. The case of the *Commonwealth* v. *Bennet* (108 Mass., 27), decided in 1871, arose out of the local-option liquor law, and in that case the court said:

> It has been argued that these statutes are unconstitutional because they delegate to cities and towns a part of the legislative power, but we can see no ground for such position; many successive statutes of the Commonwealth have made the lawfulness of sales of intoxicating liquors to depend upon licenses from the selected men of towns, or commissioners of counties, and such statutes have been held to be constitutional. It is equally within the power of the legislature to authorize a town, by a vote of its inhabitants, or a city, by a vote of its council, to determine whether the sale of particular kinds of liquors within its limits shall be permitted or prohibited.

In Minnesota (*Ross* v. *The State*, 6 Minn., 291) the State supreme court declared constitutional a law submitting to popular vote a proposition for the removal of the county seat, the court saying that the law "was as much a law prior to the vote of the people as subsequent to that event, its operative force being suspended, merely its validity being dormant. It is precisely the same

case as the passage of the law by the legislature made to take effect upon the happening of any other event, such as a future day, which is the most usual course.

In Mississippi the statute was sustained which authorized a vote of the people upon a proposition to tax to aid in repairing and perfecting the levees on the Mississippi River. The court, in this case, recognized the principle contended for, but reached the conclusion that a power to enact a law includes in it the power to determine and prescribe the conditions upon which a law may come in operation, and was of opinion that this contingency may as well be a vote of the people as anything else. (*Alcorn* v. *Haymer*, 38 Miss., 652.) This decision was rendered in 1859. In the later case of *Barnes* v. *Board of Supervisors of Pike County* (51 Miss., 305), decided in 1875, the constitutionality of an act submitting to the people of Pike County the choice of a permanent location of their county seat was upheld. And in the case of *Schulherr* v. *Bordeaux* (64 Miss., 59), decided in 1886, the court said:

> On the question of the right to make an act of the legislature depend for its operation upon a future contingency, argument was exhausted long ago, and the principle established by oft repeated examples and by adjudication in this State and elsewhere in great numbers that this may be done without violating the constitution.

In Missouri the doctrine of the supreme court is made to rest upon the distinction between an unconstitutional delegation of power and the right of the legislature to pass an act to take effect upon the happening of a future

contingency, and was expressed by that court in 1887 as follows:

> While the rule that the legislature is only invested with the power to make laws, and that it can not delegate to the people the power to pass a law, does not admit of question, there is another rule just as formally and indisputably established, which is that the legislature may pass a law to take effect or go into operation on the happening of a future event or contingency, and that such contingency may be a vote of the people. (*State ex rel. Maggard* v. *Pond*, 93 Mo., 606.)

In New Hampshire the New York distinction prevails, and while laws depending for their operation upon the votes of localities are upheld, an act to be submitted to the whole people at a regular biennial election was declared to be unconstitutional. (See *State* v. *Noyes*, 10 Foster, 279, and *State* v. *Hayes*, 61 N. H., 264.)

In New Jersey an act submitting to the voters of a town the proposition whether or not they would become an incorporated town was sustained, and likewise have cases arising from local-option laws. (See *City of Paterson* v. *The Manufacturers*, 4 Zab., 385; *State* v. *The Court of the Common Pleas of Morris Co.*, 36 N. J., 72; *Hall* v. *Gloucester Co.*, 50 N. J., 585.)

In New York the case of *Barto* v. *Himrod*, which has already been adverted to, and in which a decision was rendered against the submission of laws to the people, the court of appeals was soon compelled to modify its opinion. In 1858, in the case of the *Bank of Rome* v. *The Village of Rome* (18th N. Y., 38), a law authorizing municipal corporations to submit to electors who were tax-

payers the question of subscribing money to aid in the construction of railroads was declared to be constitutional. The court held that this was not a delegation of legislative power, within the scope of *Barto* v. *Himrod*, and a distinction was drawn between acts relating to the whole State and those relating to local communities. The court further explained this distinction in the case of the *Bank of Chenango* v. *Brown* (26th N. Y., 467), in the following words:

> It is a material distinction between the cases (this case and *Barto* v. *Himrod*), that the people of a particular municipality or local bodies are not the constituents of the legislature. They are not the people of the State of New York who have irrevocably committed their power of legislation to the legislature by a delegation, which does not permit that legislature to remand any legislative question to their constituency.

This position, to say the least of it, is unique, and it has been repudiated by the supreme courts of a number of States. (See *Manly* v. *The City of Raleigh*, 4 Jones Eq., N. C., 370; *Smith* v. *The City of Janesville*, 26 Wis., 291, 295; *Fill* v. *State*, 42 Md., 71.) The opinion of the court in *Bank of Chenango* v. *Brown*, *supra*, was affirmed in the case of *Clark* v. *The City of Rochester* (28 N. Y., 605), which was a case involving the constitutionality of a law submitting to the inhabitants of Rochester a proposition to subscribe stock to a railroad company. The court in this case explained its position somewhat more fully, saying:

> While general statutes must be enacted by the legislature, it is plain that the power to make local

> regulations having the force of law in limited localities may be committed to other bodies representing the people in their local division or to the people of those districts themselves. Our whole system of local government in cities, villages, counties, and towns depends upon that distinction. The practice has existed from the foundation of this State and has likewise been considered a permanent feature in the American system of government. * * * I do not say that it can be submitted to the electors of a city or village to determine what power its local legislative shall possess, but only that these bodies may be made the depositors of such powers of local government as the legislative may see fit to prescribe and the exercise of which is not repugnant to any of the general arrangements of the Constitution.

In a subsequent case the court upheld the provision in a village charter providing for the submission of the question of license or no license (*The Village of Gloversville* v. *Howell*, 70 N. Y., 287).

In North Carolina the supreme court, in the case of *Manly* v. *The City of Raleigh* (4th Jones Eq., 370), which was decided in 1859, and in which the opinion was delivered by the celebrated Chief Justice Pearson, declared that the legislature could pass laws depending on the vote of the people. It reviewed at length the case of *Barto* v. *Himrod*, and said:

> This decision and the reasoning offered in support of it fail to satisfy us that the legislature has *not the power* to pass a law depending upon a vote of the people or the acceptance of the corporation. It is certain that the legislature has the power to pass a law to ascertain these facts, and may afterwards make

a law in conformity thereto; so, in its practical result, it makes no difference which act precedes the other. In the instance of the division of the county of Surrey and also that of the free schools in New York, subsequent acts were passed confirming the first, and in regard to the latter no question as to the power of the legislature could be raised. It is not denied that a valid statute may be passed to take effect upon the happening of an uncertain future event, upon which the legislature, in effect, declares the expediency of the law to depend, and when it is provided that a law shall not take effect unless a majority of the people vote for it, or it is accepted by a corporation, the provision is, in effect, a declaration that in the opinion of the legislature the law is not expedient unless it be so voted for or accepted.

It seems to us that the court in New York fell into error by not discriminating between a *want* of power and an *abuse* of power. All legislative power is vested in the general assembly, restricted only by the constitution. There is no prohibition in the constitution against this method of legislation, consequently, although it may be an abuse of power, greatly to be deprecated, as tending to subvert the principles of our representative form of government, still the power has been granted, and it is not the province of one branch of the government to correct the supposed abuse of another. The judiciary can only interfere when the legislature acts without power, that is, in violation of the constitution.

The views expressed by the court in this case have been sustained in numerous subsequent decisions, as in *Cain* v. *The Commissioners* (86 N. C., 8), a case arising out of a fence law. The court decided that this was not a transfer of legislative power to the people, it simply be-

ing a law to take effect upon the happening of a contingent event. (See also *Newson* v. *Earnheart*, 86 N. C., 391.)

In Ohio the doctrine of the supreme court on this subject was announced as early as 1852, in one of the most vigorous opinions to be found in the books and one which has been as extensively quoted, perhaps, as that of any decision upon this subject, and which we find quoted with approval by the Supreme Court of the United States in the case of *Field* v. *Clark* (143 U. S., p. 694). I refer to the case of the *Railroad Company* v. *Clinton County* (1 Ohio State, 77). That case arose upon a statute authorizing counties and other local subdivisions of the State to subscribe to the capital stock of a railroad, the subscription being conditioned upon the consent of the people. The constitutionality of the act was upheld and the court said:

> Such a law is perfect, final, and decisive in all its parts, and the discretion given only relates to its execution. It may be employed or not employed. If employed, it rules throughout; if not employed, it still remains the law ready to be applied whenever the preliminary condition is performed. The true distinction, therefore, is between the delegation of power to make the law, which necessarily involved a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made.

In 1889, in the case of *Gordon* v. *The State* (46 Ohio State, 607), the constitutionality of the township local

option liquor law was upheld, the court being of opinion that in the exercise of the duties devolving upon a legislative branch of the State government discretion and judgment are required, not only in determining the subject-matter of the legislation, but in ordering the conditions or contingencies upon which laws are to be carried into effect, and that it was entirely permissible for the legislative body to condition the going into effect of such a law upon the happening of a particular event or contingency thereafter to arise, or upon the performance of some specific condition, and that in so doing they were not delegating to others functions which they themselves should have exercised.

In Pennsylvania the opinion given in *Parker* v. *The Commonwealth*, in 1847, and which has already been adverted to, holding unconstitutional a local-option law, was gradually modified and afterwards directly reversed. Only one year after this decision the same court decided in favor of a law submitting the question of township division. The court found a distinction between this question and the liquor question, which was the subject-matter of *Parker* v. *The Commonwealth*, and said that "If the legislature can authorize the courts to decide questions of this character, they can also authorize the people primarily to do so. If the power can be given to a selected few, it can also be delegated to all the inhabitants of a district, unless positively prohibited." This view was also taken in *Commonwealth* v. *Painter* (10th Barr., 214) and in *Moers* v. *The City of Reading* (21 Pa., 188). In 1873, in the celebrated case of *Locke's appeal* (72 Pa., 491), the case of *Parker* v. *The Commonwealth*

was directly reversed, the law under review in each case involving the right of the people in their local districts to prohibit the sale of liquor. This, likewise, is one of the most celebrated cases to be found on this subject, and has likewise been most extensively quoted by other courts in support of the doctrines there announced, and it is quoted with approval by the Supreme Court of the United States in the case of *Field* v. *Clark* (143 U. S., at p. 694). The decision in this case was rendered by Mr. Justice Agnew, and in the course of the opinion it was said:

> The law is simply contingent upon the determination of the fact whether licenses are needed, or are desired. And why shall not the legislature take the sense of the people? Is it not the right of the legislature to seek information of the condition of a locality, or of the public sentiment? The constitution grants the power to legislate, but it does not confer knowledge. The very trust implies that the power should be exercised wisely and judiciously. Are not the public sentiment and local circumstances just subjects of inquiry? A judicious exercise of power in one place may not be so in another. Public sentiment or local condition may make the law unwise, inapt, or inoperative in some places and otherwise elsewhere. * * * So long, therefore, as the legislature only calls to its aid the means of ascertaining the ability or expediency of a measure, and does not delegate the power to make the law itself, it is acting within the sphere of a just power.

The court then goes on to formally overrule the case of *Parker* v. *The Commonwealth*, and delivers itself of these sentences, which have become famous, so often have

they been quoted with approval by the courts of the various States and by the Supreme Court of the United States:

> The true distinction I conceive is this: The legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or set of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government.

The opinion concluded as follows:

> I have not thought it necessary to refer to the decisions in other States, for the plain reason that our own decisions since *Parker* v. *The Commonwealth* ruled the case, while that case was the forerunner of the decisions in all the other States, except Delaware, and with its fall they have lost their chief prop and support.

In Tennessee the supreme court found the submission of laws to the people to be constitutional, as early as 1854, in a case arising out of the internal improvement act of 1852 (*Railroad Company* v. *Davidson County*, 1 Sneed, 640).

In Vermont the supreme court decided in favor of the constitutionality of submitting laws to the people for ratification, as early as 1849, in the case of *Bancroft* v. *Dumas* (21 Vt., 456), which arose out of the State liquor-license law of 1846, wherein provisions were made for an annual vote of the people of all the counties throughout the State on the license question. The court held that the fact that all of the people of the State were to vote upon this question did not invalidate the law any more than if

only a portion of them were to vote thereon. The Delaware case of *Rice* v. *Foster* and the Pennsylvania case of *Parker* v. *The Commonwealth* were reviewed and dissented from. The views of the court in this case were subsequently reaffirmed in 1854 in *The State* v. *Parker* (26 Vt., 35), which came up upon the "Maine liquor law," which had been enacted by the Vermont legislature in 1852, and was submitted to the people. These decisions have all been sufficiently adverted to.

In Virginia the supreme court of appeals, in *Goddin* v. *Crump* (8 Leigh, 20), declared constitutional a law submitting to the people of Richmond the question of subscribing stock to a canal company. The subject was further reviewed by the court in 1855, in *Bull* v. *Read* (13 Gratt., 78), upon a statute providing for the establishment of a system of free schools in a particular district or county, the act not to go into effect until the people of the district should approve it at an election to be held for that purpose, in which the court said:

> It will be conceded that the legislature may provide that an act shall not take effect until some future day named, or until the happening of some particular event, or in some contingency thereafter to arise, or upon the performance of some specific conditions (citing a number of cases in which such laws have been passed by the State and Federal governments). Now, if the legislature may make a portion of an act depend upon some contingency thereafter to happen, or may prescribe conditions, it must be for them to judge in what contingency or upon what condition the act shall take effect. They must have the power to prescribe any they may think proper, and if the condition be that a vote of

> approval shall first be given by the people affected by the proposed measure, it is difficult to see why it may not be as good and valid as any other condition whatsoever. * * * To say that in such a case the act is made by the voters and not by the legislature is to disregard all proper distinctions and involves an utter confusion of ideas upon the whole subject.

This position was further affirmed in the case of *Savage* v. *The Commonwealth* (84 Va., 619), wherein was cited with approval the previous case of *Bull* v. *Read* in 13th Gratt.

In Wisconsin this system of making laws was reviewed by the court in the case of *State* v. *O'Neill* (24 Wis., 149). The legislature had passed an act establishing a board of public works in Milwaukee, which, however, was to be null and void unless approved by the people at an election to be held in 1869. It was contended that this law was not enacted by the will of the legislature, but that the latter had merely proposed it and referred it to the people of Milwaukee. The court said that the act was what is termed in books a conditional one, and was to take effect or go into operation upon a contingency provided in the law itself. It is a complete enactment in itself, contains an entire and perfect declaration of the legislative will, requires nothing to perfect it as a law, still it is only left to the people to be affected by it to determine whether they will avail themselves of its provisions. And the same doctrine is announced in the case of *Smith* v. *The City of Janesville* (26 Wis., 291). In this case the act of the legislature of 1866 was held not to be invalid, because by its terms it was to take

effect only after it should be approved by a majority of the popular votes of a whole State at a certain election, and it was admitted in this case, to draw a distinction similar to that which exists in New York between the referees of a State to a particular locality or municipality, and the reference of it to the people of the whole State, but the court was of opinion that there existed no real distinction. The court said:

> It being conceded that the legislature possesses this general power, the only question here would seem to be whether a vote of the people in favor of the law is to be excluded from the number of those future contingent events upon which it may be provided that it shall take effect. A similar question was before this court in the case of *State* v. *O'Neill*, and was very elaborately discussed. We came unanimously to the conclusion in that case that a provision for a vote of the electors of the city of Milwaukee in favor of an act of the legislature, before it should take effect, was a lawful contingency, and that the act was valid. That was a law affecting the people of Milwaukee particularly, while this one affects the people of the whole State. There the law was submitted to the voters of that city, and here it was submitted to those of the State at large. What is the difference between these two cases? It is manifest on the principles that there can not be any. The whole reasoning of that case goes to show that this act must be valid, and so it has been held in the best-considered cases, as will be seen by reference to that opinion. We are constrained to hold, therefore, that this act is and was, in all respects, valid from the time it took effect, and consequently there was no want of authority for the levy and collection of the tax in question.

The States which have apparently taken the opposite view of this question are California, Iowa, Nevada, New Hampshire, and Texas. In California, in the case of *Upham* v. *The Supervisors of Sutter County* (8th Cal., 379), decided in 1857, that a law submitting to the people of the county the question of the location of their county seat was constitutional, and in *Blanc'ing* v. *Burr* (13th Cal., 343) and *Hobart* v. *The Supervisors of Butte County* (17th Cal., 24), the submission to popular vote of laws relating to local districts was likewise declared to be constitutional. But in 1874 the California court, in the case of *Ex parte Wall* (48 Cal., 279), appears to have undergone a change of mind on this subject and to have become affected with the fear of an approaching democracy to such an extent as to overtly overrule its previous decisions. In that case the court said:

> Our Government is a representative republic, not a simple democracy. Whenever it shall be transformed into the latter, as we are taught by the examples of history, the tyranny of a changeable majority will soon drive honest men to seek refuge beneath the despotism of a single leader. * * * On the question of the expediency of the law, the legislature must exercise its own judgment definitely and finally. If it can be made to take effect upon the occurrence of an event, the legislature must declare the law expedient, if the event shall happen, but inexpedient if it shall not happen. They can appeal to no other man or men to judge for them in relation to its present or future propriety or necessity. They must exercise that power themselves and thus perform the duty imposed upon them by the Constitution.

It will thus be seen that the decision in this case was brought about by the nightmare of a future unlimited democracy to come. The court's position, that to permit people who are affected by the laws to vote directly for or against them, would drive honest men to "seek refuge beneath the despotism of a single ruler" seems tantamount to a declaration that a majority of the people are dishonest and only the minority are honest—a proposition which seems to be entirely out of tune with the whole spirit and genius of our institution. At all events the argument of the court is purely chimerical and is not founded upon any legal reasons whatever. Since the rendition of the decision in this case, the court in the case of *The People* v. *Nally* (49 Cal., 478), and *The People* v. *McFadden* (81 Cal., 489), has declared constitutional two laws submitting to popular vote propositions for change in county boundary, and it would therefore seem that the supreme court of California is halting between two opinions on this subject.

In Indiana the decisions are by no means uniform or reconcilable. In 1853, in the case of *Maize* v. *The State* (4th Ind., 342), the supreme court declared a local-option law to be unconstitutional, because the court was afraid that by the passage of such laws the Government would be changed from a representative republic into a pure democracy, such as Athens was, and the court thought that if one enactment might be submitted to such a vote, they all might be so submitted, and that the representative system of the Government would be wholly subverted. In a later case, the case of *Greencastle Township* v. *Black* (5th Ind., 557), the court adhered to its decision

in the Maize Case, and found to be unconstitutional a law authorizing the people of townships to vote to tax themselves for school purposes. On the other hand, in 1869, the supreme court admitted the constitutionality of a law authorizing counties and townships, with the popular consent, to subscribe stock to railroad companies. (*The Railroad Company* v. *Geiger*, 34th Ind., 185). And the court was still further led away from the doctrines laid down in the Maize Case in the case of *Groesch* v. *The State* (42 Ind., 547). And in this case, while the Maize Case was not in terms overruled, yet the doctrines there announced are so wholly antagonistic to those laid down in the Maize Case and in the case of *Greencastle Township* v. *Black*, and those cases are so discredited by the court's citing numerous cases from other statutes directly in their teeth, that it may now be very safely said that the policy of the supreme court of Indiana is in favor rather than against this method of legislation.

In Iowa the supreme court decided, in 1855, a law for the submission to a vote of the people of the entire State concerning a prohibitory liquor law to be unconstitutional. (*Santo* v. *The State*, 2 Iowa, 165.) And in *Geebrick* v. *The State* (5 Iowa, 491) a local-option liquor law was likewise declared to be unconstitutional. In *Dalby* v. *Wolfe* (14 Iowa, 228) a local-option stock law, by a most intricate and by no means lucid process of reasoning, was distinguished from a local-option liquor law and was held to be valid. But in 1871, in the case of *The State* v. *Wier* (33 Iowa, 134), another local-option liquor law was declared to be unconstitutional, and in the case of *Wier* v. *Cram* (37 Iowa, 649) a

local-option stock law was declared to be unconstitutional. The supreme court of this State has been so vacillating in its position on this subject and has been led into so many conflicting decisions that it can not be said to have any policy on the subject whatever. It appears to depend entirely upon the personnel of the court at the time the case is reached.

In Nevada there was a decision rendered in 1869 in the case of *Gibson* v. *Mason* (5th Nev., 283), wherein it was decided that an act of the legislature which depended upon the approval of the votes of the people was unconstitutional.

In New Hampshire the New York distinction obtained, and while laws which are submitted to the people of local districts have been sustained, the court in 1881 (*State* v. *Hayes*, 61 N. H., 264) declared to be unconstitutional a law which had been submitted to the people of the whole State providing for minority representation in corporations.

In Texas, in 1856, a local-option liquor law was declared to be unconstitutional. (*State* v. *Swisher*, 17 Tex., 441). This opinion, however, has been repeatedly explained away and overruled. See *San Antonio* v. *Jones* (28 Tex., 32) wherein a law submitting to the people of the city whether it should subscribe for railroad stock was declared to be constitutional. See also *Werner* v. *The City of Galveston* (72 Tex., 22); *Johnson* v. *Martin* (75 Tex., 33), wherein it is said that the privilege of the electors of a district to be affected by a law to say whether they will accept its provisions, the law giving them the right to accept or reject it, is generally permitted and re-

garded as constitutional. And so a local-option liquor law, passed in 1876, was thoroughly reviewed in 1883 by the court of appeals (14 Tex. Court of Appeals, 505), and the rule stated to be that although the legislature could not delegate the power to make laws it could enact a law to delegate the power to determine some fact or state of things upon which the validity of the law may depend, which fact or state of things may be a vote of the people. So that the latest and best-considered opinions in this State place it in the affirmative instead of the negative column on this subject.

Thus it will be seen that the overwhelming weight of authority is decidedly in favor of the method of submitting laws to popular vote, and while there have been several adverse decisions, they were most of them delivered many years ago, when thought on the subject had made but little progress. The validity of this system of legislation was recognized in New England, where the town meeting was in use, from a very early time, and it was not possible that the other States would remain far behind in learning the utility and convenience of this plan of local government.

Leaving aside the decisions in the case of *Rice* v. *Foster* and *Parker* v. *The Commonwealth*, which were both decided about 1850—the latter case being reversed in its own State in the case of *Locke's Appeal* in 1874—and the case of *State* v. *Swisher*, which has been subsequently explained away in its own State, and the case of *Maize* v. *The State* and *Greencastle Township* v. *Black*—all of which were decided prior to 1860, and all of which have been very much modified even in their own States—the

tendency of the courts has been steadily in favor of this system of lawmaking. Really the only cases in which this method of legislation has been declared to be unconstitutional are the cases of *Ex parte Wall* in California, the case of *Geebrick* v. *The State*, in Iowa, and in *Lammert* v. *Lidwell*, in Missouri; but these decisions are exceptional and stand unsupported by the best judicial authority, and are denied by the overwhelming weight of decisions to the contrary.

It is to be noted that the decisions against this method have been in cases which drew in question the constitutionality of local option liquor laws. The direct question has been embarrassed by extra judicial opinions which have not contributed to give unbiased expression of the court's views. The liquor question touches the daily living customs of the people, and men, even those presiding over courts, are sometimes unable to rid themselves of prejudices and discuss this subject as they would others. This opinion is induced by a reading of the deliverances of many State courts on liquor cases. Personal feeling has been brought plainly into evidence in a number of cases, but never more plainly than in the dissenting opinion in Locke's appeal by the chief justice of the supreme court of Pennsylvania, wherein the judge stated his own habits regarding the use of liquor and introduced other extraneous arguments in nowise bearing upon the legal side of the case.

The objection to the practice of submitting laws to popular vote has generally been made to turn upon the proposition that it is inconsistent with the representative

principles, and that the theory of our Government is subverted by transferring the power and duty of making the law directly to the people, or to a portion of them, thus relieving the representative body of its proper duties and responsibilities. But the power of legislating in this wise is granted in the constitution, and in the Constitution of the United States the power to regulate commerce is one of the express powers, and it is therefore subjected to no restriction save the inhibitions contained in the Constitution itself. There is no restriction placed upon its exercise in the Constitution, and it follows that the power to regulate commerce is plenary, and that all proper means for that purpose may be exercised by the Congress without restrictive inhibitions from the courts. This point is most aptly illustrated in the case of *McCullough* v. *Maryland* (4 Wheat., 315, 413), which arose over the words of the Constitution granting to the Congress power to pass all laws which are "necessary and proper" to carry into execution powers conferred by that instrument. It was contended in that case that these words carry with them the right only to pass such laws as were indispensably requisite or absolutely necessary for the accomplishment of the desired object, but the court held that if the object be within the scope of the Constitution all measures which are appropriate to that end may be employed to carry it into effect, and that the *degree* of its necessity is to be determined by the Congress alone, and that when the Congress has determined that degree the court can not review its decision.

The confusion which has existed in the courts between a *lack of power* and what some jurists have been pleased

to consider the unwise *exercise* of legislative *discretion* is so well stated by Chief Justice Pearson in *Manly* v. *The City of Raleigh* (4th Jones Eq. N. C., at p. 376) that we may be pardoned for again adverting to it. In reply to the objections that had been made to this method of legislation by the court of appeals of New York in the case of *Barto* v. *Himrod*, Chief Justice Pearson says:

> It seems to us the court in New York fell into error by not discriminating between a *want* of power and an *abuse* of power. All legislative power is vested in the general assembly, restricted only by the Constitution. There is no prohibition in the Constitution against this method of legislation, consequently, although it may be an abuse of power greatly to be deprecated as tending to subvert the principles of a representative form of government, still the power has been granted and it is not the province of once branch of the Government to correct the supposed abuses of another.

It is interesting to observe that these chimerical fears of the subversion of our representative form of government by too much democracy has not been shared by the people of the country, and during the past seventy-five years the people have gone on steadily absorbing more power of this character to themselves, and steadily taking from the legislatures that which had been hitherto deemed their special function. There is no denying that from year to year there has been a general and growing distrust for State legislatures, which has resulted in a very large curtailment of their authority, and which appears likely to result in a much further curtailment of such authority in the near future. With the extension of the Federal power on the one hand, which is giving the

States a more limited field for the exercise of what were formerly esteemed their prerogatives, and the tendency on the other to remove what authority is still preserved to the States from the custody of the legislatures and to entrust it to other agents, these bodies are coming to have a greatly diminished influence. Much of the authority hitherto exercised by legislatures has been absorbed by constitutional conventions, which frame codes limiting the session of the legislature to a short term, and minutely defining upon what subjects within this short term these bodies may and may not legislate. These codes or constitutions are not repealable or alterable by the legislatures, and the people themselves have absorbed additional authority. The constitutions are referred by the conventions which frame them to the popular vote; constitutional amendments, though proposed by the legislatures, are submitted to the people for their ratification or rejection. Laws applying to the whole State, and laws relating to various local districts of the State, on certain subjects, by force of obligatory constitutional provisions, or by custom, are submitted to the direct popular vote of the people. And, indeed, there is now existent a widely diversified demand for taking from the legislatures the really only important functions which they seem to retain, to wit, the election of two United States Senators. And thus we see that the people have answered these fears of democracy by prescribing more democracy.

One of the earliest examples of referring a law to the people to be affected by it, for their approval or disapproval, is furnished by the action of the Federal Congress. We refer to the act of July 9, 1846.

The land which had been ceded by the State of Virginia to the United States for the purpose of a seat of government in the district, afterwards called the District of Columbia, did not prove to be needed for that purpose by the Federal Government, and the Congress, by the above-recited act, submitted to the people of the county of Alexandria the question of retrocession, and, the popular assent being given, the county was reattached to the State of Virginia. (See 9 Stat. L., p. 35, and the proclamation of President Polk on p. 1000.) This statute has been much cited by the State courts as tending to show the constitutionality of lawmaking by vote of the people in the States, inasmuch as the method had been thus employed by the Federal Government. And so one of the earliest, if not the earliest, decisions which upheld the constitutionality of a law made to depend upon a future event, and directing that event to be made known by a person other than the legislature, is furnished by the decision of this court in 1812 in the case of *Cargo of the brig Aurora* v. *The United States* (7 Cranch., 382). This case grew out of the violation of the nonintercourse act passed by Congress during the period preceding the war of 1812. This was a law which was to be enforced against Great Britain and France until those countries should modify their policy toward the United States, when the President was authorized to raise the embargo by proclamation. It depended for its repeal upon a contingency, which contingency was to be declared by the President. This case has likewise been extensively cited by the State courts in support of the constitutionality of this character of legislation. And the case was cited

and quoted with approval by this court in 1891, in the case of *Field* v. *Clark* (143 U. S., at p. 691). In this case it was held that the authority conferred upon the President by the McKinley tariff bill of 1890 (26 Stat., 612), to suspend by proclamation the free introduction of sugar, molasses, etc., when he is satisfied that any country producing such articles imposes duties or other exactions upon the agricultural or other products of the United States which he may deem to be reciprocal, unequal, or unreasonable, is not open to the objection that it unconstitutionally transfers legislative power to the President. Mr. Justice Harlan, who was the organ of the majority of the court in that case, cited and quoted with approval a number of the cases from the State courts, which have already been referred to, as follows:

> The true distinction, as Judge Ramey, speaking for the supreme court of Ohio, has well said, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made. *Cincinnati, etc., Railroad* v. *Commissioners* (1 Ohio State, 88). In *Moers* v. *The City of Reading* (21 Pa. State, 188, 202) the language of the court was: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it can not be said that the exercise of such discretion is the making of the law." So in *Locke's Appeal* (72 Pa. State, 491–498): To assert that a law is less than a

law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare, whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know. The proper distinction, the court said, was this: "The legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or set of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government." There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.

How pertinent is this language to the case at bar? If it is to be held that the Congress can not empower the Secretary of War to perform the duties intrusted to him by the acts under discussion, then the power to regulate commerce between the States, granted to the Congress by the Constitution, might as well be stricken out of the enumerated powers in that instrument, since it would be practically impossible for the Congress to regulate every matter of detail concerning the exercise of this vast and important duty. Such a decision, to use the language of the Pennsylvania supreme court, which was quoted with approval by this court in the extract just cited, would be to stop the wheels of government. It would be impossible for the Congress to be perpetually in session and to pass directly upon every question raised as to whether or not a given structure was an obstruction to navigation; to turn itself into a judicial tribunal to hear the evidence

pro and con upon these subjects and arguments of counsel, and to determine for itself in every instance whether a given structure should be required to be removed in order to prevent obstruction to commerce. Whatever fine-spun theories of argument may be made, the practical fact remains that it would be impossible for the Congress to do it. Because the Congress *may* do a thing, it by no means follows that it *must* do it. The Congress can only legislate in a general way, and large powers are necessarily entrusted to the different departments relating to matters of administration and execution, and the field of this discretionary power is so vast and important, and the interests of modern life so intricate, that the doctrine of *delegatus non potest delegare* as applied restrictively to the exercise of legislative discretion of this character has no practical existence at the present time. In this court no instance can be found in which a statute has been declared to be unconstitutional because it delegated to another legislative or judicial functions, although there has been, perhaps, more litigation along this line in this court than in all the State courts combined—not, perhaps, in number, but in the variety of the statutes which have been attacked upon this ground. In the act which is now being attacked we have a law whereby the Congress has passed a complete act providing that it shall be a misdemeanor to maintain an unreasonable obstruction to navigation, after a notice and hearing, and after the special tribunal charged with the investigation and finding of the facts has determined that there is an unreasonable obstruction, and a reasonable time for removing the obstruction has expired. The party concerned has a hearing and

the offense is not complete until after the hearing and a determination against him, and an opportunity to abate the obstruction has been given. The whole inquiry resolves itself into this: Must the Congress itself consider every case of alleged obstruction to navigation and determine the facts and declare that an obstruction exists, or can it generally define the offense and leave the facts to be determined by a special agent delegated for that purpose? There can be but one answer to this question if we are to have any regard for the practical enforcement of the duty imposed upon the Congress by the Constitution to regulate commerce. And whether this question be reached by a refinement upon the facts holding that the Congress has not, in fact, delegated any power which it itself ought to perform, or whether the decision be put upon a denial of this limitation as applied to an expressly enumerated power in the Constitution, when that instrument itself contains no inhibitions upon it, is immaterial. If it be conceded that the Congress can not delegate to other agencies any form of legislative power, still in this case there has been no such delegation and no attempt at such a delegation. In either aspect of the case the judgment of the court below should be affirmed.

GEORGE HINES GORMAN,
*Special Attorney for the United States.*

J. K. RICHARDS,
*Solicitor-General.*

tunities to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes to be made and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the District in which such bridge is situated to the end that the criminal proceedings mentioned in the succeeding section may be taken. § 5. That section ten of the River and Harbor Act of August 11th, 1888, be amended and reënacted so as to read as follows: That if the persons, corporations or associations owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such person, corporation or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5000, and every month such person, corporation or association shall remain in default as to the removal or alteration of such bridge, shall be deemed a new offence and subject the person, corporation or association so offending to the penalties above described." 26 Stat. 426, 453, c. 907. Proceeding under that act the Secretary of War gave notice to the County Commissioners of Muskingum County, Ohio, to make on or before a named day certain alterations in a bridge over the Muskingum River, Ohio, at Taylorsville in that State. The Commissioners, although having control of the bridge did not make the alterations required and were indicted under the act of Congress. *Held*, that however broadly the act of Congress may be construed it ought not to be construed as embracing officers of a municipal corporation owning or controlling a bridge who had not in their hands, and under the laws of their State could not obtain, public moneys that could be applied in execution of the order of the Secretary of War within the time fixed by that officer to complete the alteration of such bridge.

The case is stated in the opinion of the court.

*Mr. Frank H. Southard* and *Mr. Simeon M. Winn* for plaintiffs in error.

*Mr. George Hines Gorman* for defendants in error. *Mr. Solicitor General* was on his brief.

Mr. Justice Harlan delivered the opinion of the court.

This is a prosecution under a criminal information filed on

behalf of the United States against the plaintiffs in error as Commissioners of the County of Muskingum, Ohio, having power under the laws of Ohio to control, alter and keep in repair all necessary bridges over streams and public canals on all state and county roads.

The information was based upon the fourth and fifth sections of the River and Harbor Act, approved September 19, 1890.

Those sections are as follows:

"§ 4. That section nine of the River and Harbor Act of August 11th, 1888, be amended and reënacted so as to read as follows: That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw-opening or the draw-span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunities to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the District in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken.

"§ 5. That section ten of the River and Harbor Act of August 11th, 1888 be amended and reënacted so as to read as follows: That if the persons, corporation or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the Secretary of War and within the time prescribed by him, wilfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such persons, corpo-

ration or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5000, and every month such persons, corporation or association shall remain in default in respect to the removal or alteration of such bridge, shall be deemed a new offence, and subject the persons, corporation or association so offending to the penalties above described." 26 Stat. c. 907, 426, 453.

Under power conferred by an act of the General Assembly of Ohio, approved March 9, 1836, the authorities of the State, between 1836 and 1840, constructed a series of locks and dams on the Muskingum River between Marietta and Zanesville.

About the year 1838, under the authority of the State, a dam was constructed across the main channel of the Muskingum River at the rapids which entirely obstructed navigation at that point, but locks and a side-cut canal were constructed so that boats could pass southward to the river below the rapids. Immediately below that dam the Commissioners of Muskingum County, about the year 1874, under the authority of the state, constructed a bridge across the river — the bridge here in question — whereby the towns of Duncan Falls and Taylorsville on opposite sides of the river were connected.

On the 2d day of May, 1885, the State of Ohio made a cession to the United States of the Muskingum River with its improvements. The act of cession contained this provision: "And for the purpose of enabling the United States to expend any sum of money that is or may hereafter be appropriated by Congress for the improvement of the Muskingum River, the State of Ohio hereby transfers and cedes to the United States the eleven locks and dams heretofore constructed by said State on said river, together with all the grounds, canals and appurtenances belonging to the same, subject to the provisions of the preceding sections of this act, as to the jurisdiction of the United States over the lands and buildings authorized to be acquired and constructed by said sections, and imposing penalties for injuries to said work which shall extend and apply to the said eleven docks and dams and their appurtenances hereby transferred and ceded to the United States, but the custody and ownership of said Muskingum River improvement shall remain

in the State of Ohio, until such time as the United States appropriates sufficient money to properly improve and operate the same." 82 Laws of Ohio, 220, 221.

The cession was accepted by the United States as is shown by the River and Harbor Act of August 5, 1886, c. 929, which contained this clause: "And the United States hereby accepts from the State of Ohio the said Muskingum River improvements, and all the locks, dams and their appurtenances, and the canals, belonging to said improvement, and all the franchises and property of every kind and rights in said river, and its improvements, now owned, held and enjoyed by the State of Ohio, including all water leases and rights to use water under and by virtue of any lease of water now running and in force between the State of Ohio and all persons using said water, hereby intending to transfer to the United States such rights in said leases and contracts as are now owned, held or reserved by the State of Ohio; but not to affect any right to the use of the water of said river now owned and held by the lessees of any water rights under any lease or contract with the State of Ohio. And the United States hereby assumes control of said river, subject to the paramount interest of navigation. The provisions of this act, so far as they relate to the Muskingum River, shall not take effect, nor shall the money hereby appropriated be available, until the State of Ohio, acting by its duly authorized agent, turns over to the United States all property ceded by the act of the General Assembly aforesaid, and all personal property belonging to the improvement aforesaid, and used in its care and improvement, and any balance of money appropriated by said State for the improvement of said river, and which is not expended on the fifteenth day of July, 1886." 24 Stat. 310, 324.

By deed of January 31, 1887, the Board of Public Works of Ohio, under legislative sanction, conveyed to the United States all the lands and tenements, with the rights and appurtenances thereto belonging, then owned, held and enjoyed by the State and theretofore occupied and used for canal and other purposes and known as the Muskingum River improvement.

During the years 1890 and 1891 the United States caused to be constructed a lock at the head of the rapids in the dam which the local authorities had maintained, and constructed from that lock down the river, under the bridge and through the rapids, an artificial canal outside of the main channel of the river, and raised the locks and dam on the river below, thus providing a new means of navigation at that point.

In the judgment of the United States' engineer having in charge the improvement of the Muskingum River, the construction by the Government of the new lock at Taylorsville made it necessary to place a draw in the Taylorsville bridge just below that lock. Of this fact the County Commissioners were informed, and they were given an opportunity to submit such statements, propositions and evidence bearing upon the matter as they might deem pertinent. Finally the following notice was issued from the War Department and served upon the commissioners:

"WAR DEPARTMENT.

"WASHINGTON CITY, February 25th, 1891.

"To the County Commissioners of Muskingum County, Ohio:

"Take notice that—

"Whereas the Secretary of War has good reason to believe that the bridge owned and controlled by Muskingum County, Ohio, across the Muskingum River, between Taylorsville and Duncans Falls, is an unreasonable obstruction to the free navigation of said river, (which is one of the navigable waters of the United States,) on account of not being provided with a draw span below the new United States lock No. 9 in said river; and

"Whereas the following alteration will render navigation through it reasonably free, easy and unobstructed, to wit, the construction of a draw span in said bridge below the said lock in accordance with the span shown on the map hereto attached; and

"Whereas to the 30th day of September, 1891, is a reasonable time in which to alter the said bridge as described above:

"Now, therefore, in obedience to and by virtue of the fourth

and fifth sections of an act of the Congress of the United States, entitled 'An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes,' approved September 19th, 1890, Redfield Proctor, Secretary of War, does hereby notify the said County Commissioners of Muskingum County, Ohio, to alter the said bridge as described above, and prescribes that said alteration shall be made and completed on or before the 30th day of September, 1891.

"L. A. GRANT,
"*Assistant Secretary of War.*"

No alteration of the bridge having been made by the Commissioners within the time limited by the Secretary of War, the present information was filed against them on the 23d day of November, 1891. The information, after referring to the official character of the defendants and setting out the facts showing the action of the War Department touching the proposed alteration of the bridge, charged that the defendants as County Commissioners of Muskingum County "did unlawfully, on, to wit, the 15th day of October, 1891, at the place aforesaid, and after receiving notice to that effect, as hereinbefore required from the Secretary of War, and within the time prescribed by him, wilfully fail and refuse to comply with the said order of the Secretary of War, and to make the alterations set forth in said notice, contrary to the form of sections four and five of an act of Congress approved September 19th, 1890."

A trial was had which resulted in a verdict of guilty. A motion for new trial having been entered, the judges before whom it was argued differed in opinion, and certified the following points of disagreement to this court: 1. Whether Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by said sections 4 and 5 of the act of September 19, 1890, to determine when a bridge is an unreasonable obstruction to the free navigation of a river. 2. Whether the failure to comply by persons owning and controlling the said bridge with the order of the Secretary of War could lawfully subject them to a penalty for a misdemeanor.

This court held that since the passage of the judiciary act of March 3, 1891, 26 Stat. 826, c. 517, certificates of division of opinion in criminal cases, according to §§ 651 and 697 of the Revised Statutes, were not authorized. *United States* v. *Rider*, 163 U. S. 132, 139. The certificate of division of opinion in this case was accordingly dismissed. Upon such dismissal the motion for new trial was denied in the Circuit Court in accordance with the opinion of the presiding judge, and it was adjudged that each of the defendants be fined in the sum of ten dollars. From that judgment the present writ of error has been prosecuted.

We have seen that by the fourth section of the River and Harbor Act of 1890 the Secretary of War was authorized, after due notice to the parties interested and after hearing them, to require persons or corporations owning or controlling any bridge over a navigable waterway of the United States which he had good reason to believe was an unreasonable obstruction to the free navigation of such waterway, to so alter the bridge as to render the navigation through or under it reasonably free, easy and unobstructed; and that by the fifth section of the same act it was made a misdemeanor for any person, corporation or association to wilfully fail or refuse to comply with the lawful order of the Secretary.

The plaintiffs in error contend that those provisions are inconsistent with the Constitution of the United States in that Congress has assumed to give the Secretary of War authority to determine matters that are legislative in their nature.

On behalf of the Government it is contended that the act of Congress has not delegated legislative power to the Secretary but has only given to that officer authority to determine the existence of certain facts as the foundation of such action by him as might be necessary to give effect to the declared purpose of Congress to remove unreasonable obstructions to the free navigation of the waterways of the United States. *Field* v. *Clark*, 143 U. S. 649, 693.

The discussion of counsel also involved the question whether —assuming the act in question not liable to the objection that it delegated legislative power to the Head of an Executive De-

partment—the expense to be incurred in the alteration of the bridge in question, which was originally constructed in accordance with law, must not be borne by the United States, which by its own agents made the proposed alteration of the bridge necessary for the purposes of navigation.

These are questions of very considerable importance. But in the view we have taken of the case, their determination is not now necessary. The record presents another question which, being determined in favor of the plaintiffs in error, requires a reversal of the judgment upon grounds that will protect them altogether against the present prosecution for not complying with the order issued from the War Department.

At the trial in the Circuit Court it was proved that the notice from the War Department to the County Commissioners to make and complete the required alteration of the bridge between Taylorsville and Duncan Falls on or before September 30, 1891, was served in March of that year; that there were then no funds in the hands of the Commissioners legally available for the purpose of making the proposed changes in the bridge; and that under the laws of Ohio defining and limiting the powers of the Commissioners, it was not possible for them by any levy of taxes to raise the money necessary to alter the bridge within the time limited by the notice from the Secretary of War or before the commencement of this prosecution.

It has not been suggested, nor could it reasonably be held, that the County Commissioners were bound, in any case, to provide out of their own private estates the money (several thousand dollars) necessary for the proposed alteration of the bridge, or that they could be made liable criminally for not so doing. The notice was addressed to them in their official capacity, and the prosecution against them was for failing to perform the duty alleged to be imposed upon them by the act of Congress. What they could or could not lawfully do, in the execution of the powers conferred upon them, must of course be determined by the laws of the State under whose authority they acted.

Assuming, for the purposes of the present decision, that the words "the persons, corporation or association owning or con-

trolling any railroad or other bridge," may, under some circumstances, apply to officers of municipal corporations, charged generally with the control and repairing of bridges owned by such corporations, the question remains whether any error of law was committed at the trial to the prejudice of the plaintiffs in error. The court charged the jury among other things: "Congress had the constitutional power to confer upon the Secretary of War the authority to determine when a bridge such as the bridge in question is an unreasonable obstruction to the free navigation of a river, and that the failure to comply by the person owning and controlling any such bridge, as by the defendants in this case, if they should so find, with such a determination by the Secretary of War, after due notice and otherwise full compliance with the act of Congress in that behalf, lawfully subjected them to prosecution for a misdemeanor, as provided by the act of Congress."

To this instruction the defendants duly excepted. Assuming the act of 1890 not liable to any constitutional objection, we think that the court, in view of the evidence, erred in saying, as in effect it did, that the mere failure of the defendants to comply with the order of the Secretary brought them within the act of Congress and subjected them to prosecution. The charge ignored altogether the proof showing that the defendants had no public moneys which they could have applied to the alteration of the bridge, and that under the laws of the State no money could be obtained, by way of taxation so as to make the required alteration within the time fixed by the Secretary of War. The court made the guilt of the accused depend alone upon the inquiry whether they had complied with the order of the Secretary of War. This was error. It ought not to be supposed that Congress intended, even if it had the power, to subject officers of a State to criminal prosecution for not doing that which it was impossible for them to do consistently with the laws of the State defining and regulating their powers and duties.

It is said that the record does not show that the Commissioners, prior to the order of the Secretary of War, suggested any want of public moneys in their hands that could be used in

altering the bridge or any want of power under the laws of the State to raise money for such a purpose by taxation, within the time limited for doing the work ordered. This is an immaterial circumstance. The record does show that the Commissioners from the outset protested against the expense of the proposed alteration being put upon the county and insisted that the United States, acting by its officers, having made that alteration necessary it should bear such expense. Nothing done or omitted to be done by the Commissioners estopped them from making any defence which the facts in the case justified. The liability of the Commissioners to criminal prosecution could not depend upon their mere failure to state to the engineer in charge of the Muskingum River improvements all that might have been urged against the demand made upon them by that officer.

We are of opinion that, however broadly the act of 1890 may be construed, it ought not to be construed as embracing officers of a muncipal corporation owning or controlling a bridge who had not in their hands, and under the laws of their State could not obtain, public moneys that could be applied in execution of the order of the Secretary of War within the time fixed by that officer to complete the alteration of such bridge. If the court on its own motion had instructed the jury, under the evidence in this case, to find for the defendants, it could not be held to have erred.

*The judgment is reversed, with directions for further proceedings consistent with this opinion.*

# RIDER *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 40. Argued November 1, 1899. — Decided May 14, 1900.

The fourth and fifth sections of the River and Harbor Act, approved September 19, 1890, provide: "§ 4. That section nine of the River and Harbor Act of August 11th, 1888, be amended and reënacted so as to read as follows: That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width or span, or otherwise, or where there is difficulty in passing the draw-opening of the draw-span of such bridge by rafts, steamboats or other water crafts, it shall be the duty of said Secretary, first giving the parties reasonable oppor-